SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER,

vs.

THE IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 28, 1966

[fol. 1]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT—January 13, 1964

File No.: A10 082 545

In re: CLIVE MICHAEL BOUTILIER

Present

Respondent: CLIVE MICHAEL BOUTILIER

Investigator: JAMES B. SARSFIELD

Stenographer: Recorded (Dictaphone)

Place: 20 West Broadway
New York, N.Y.

Language: English

Date: January 13, 1964

[fol. 2] Investigator Sarsfield to Respondent:

Q. I am an officer of the United States Immigration and Naturalization Service, and I desire to question you under oath regarding your homosexual activities. Any statement you make must be made voluntarily and of your own free will. Such statement may be used against you by the Government as evidence in any civil or criminal proceeding. Are you willing to make such a statement under oath?

A. I do.

Q. Do you swear that the statement you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. Will you please stand and raise your right hand? Do you swear that these statements that you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. To the best of my ability.

Q. What is your true and correct name?
A. Clive Michael Boutilier.
Q. Have you ever used any other name?
A. No.
Q. What is your date and place of birth?
A. September 3rd, 1933, Sheet Harbor, Nova Scotia.
Q. Could you spell Sheet Harbor, Nova Scotia?
A. S-h-e-e-t H-a-r-b-o-u-r N-o-v-a S-c-o-t-i-a.
Q. Of what country are you a citizen?
A. Canada.
Q. Where were your parents born?
A. Canada.
Q. Was your father ever in the United States?
A. For a visit only.
Q. Did he ever reside here permanently?
A. No.
Q. Has your mother ever resided permanently in the United States?
A. Yes, she's here since 1956 on a visa.
Q. She resides here in New York City?
A. Yes, in Brooklyn.
[fol. 3] Q. Of what country is your mother a citizen?
A. Canada.
Q. Of what country was your father a citizen?
A. Canada.
Q. How long ago did your father pass away?
A. About 1957.
Q. Have you ever been married?
A. No.
Q. Have you ever had any children?
A. No.
Q. Do you have any claim to United States citizenship at this time?
A. No.
Q. When did you last enter the United States?
A. I entered the United States on June 22, 1955 at New York for permanent residence.

Q. How many trips have you made outside the United States since you entered for permanent residence in 1955, approximately?

A. Approximately four for vacations.

Q. What was the longest length of time you were gone?

A. Two weeks I went to Trinidad in the British West Indies.

Q. And when was the last time you left the United States for a visit?

A. I believe it was three years ago for Christmas vacation.

Q. Where did you go on this Christmas vacation?

A. Lansdowne, Mictou County, Nova Scotia.

Q. Could you spell out the name of that county?

A. M-i-c-t-o-u County.

Q. And when you returned at what port in the United States did you enter?

A. New York.

Q. Were you ever in the United States before you entered for permanent residence on June 22, 1955?

A. No.

[fol. 4] Q. Were you ever arrested outside the United States?

A. No.

Q. Were you ever arrested in the United States?

A. Yes.

Q. Could you tell me when, where and on what charge you were arrested in the United States?

A. It was October 2nd, 1959 at Brooklyn, New York, sodomy charge and it was DOR on September . . . March 12, 21, 1960.

Q. Why was it DOR, and by DOR do you mean discharged on your own recognizance?

A. Yes, it was dismissed because the complainant failed to appear in the court.

Q. Actually it wasn't dismissed because. . . . did the judge say it was dismissed?

A. No, it was dismissed on my own recognizance, because...

Q. This charge of sodomy, what did it involve?

A. I inserted my penis in his rectum and had an orgasm.

Q. Did anything else happen besides that?

A. Yes, later I put my penis in his mouth and had a blowjob.

Q. Was this voluntary on the part of the person with whom you were doing these acts?

A. Yes.

Q. Was it voluntary on your part?

A. Yes.

Q. Do you remember the name of this person?

A. No. I don't recall the name.

Q. Was this a man that you performed these acts with?

A. Yes.

Q. What do you mean by an orgasm?

A. Ejaculate.

Q. What do you mean by ejaculate?

A. I had my sex myself.

Q. Can you be more specific by what you mean by orgasm?

A. A flow of sperm came from my penis.

[fol. 5] Q. Were you ever arrested anywhere else in the United States at any time?

A. No.

Q. When did you have your first homosexual act? Approximately?

A. Approximately when I was fourteen.

Q. With whom did you have this act?

A. With another man.

Q. Was this man younger than you or older than you?

A. Older.

Q. How much older?

A. He was approximately forty.

Q. What actually took place with this man when you were fourteen years of age?

A. We had planned a hunting trip and I stayed at his home that night, his wife was away, and we shared the same bed. He tried to put his penis in my rectum. He didn't succeed but a flow of sperm came from his penis on my clothing.

Q. Where did this take place?

A. In Canada.

Q. Whereabouts in Canada?

A. In (unintelligible) County, Nova Scotia.

Q. Did you say that it was at his home?

A. Yes.

Q. How do you spell Picto County?

A. P-i-c-t-o-u.

Q. Did any other acts of that nature take place with this man?

A. No.

Q. When did you have your next act . . . when did you have . . . this occurred when you were fourteen years of age?

A. Yes.

Q. When did you have a homosexual act after this? About how long ago?

A. About two years after that.

Q. And where did this occur?

A. In Halifax, Nova Scotia.

Q. Whereabouts in Halifax, Nova Scotia?

A. In a public park.

Q. And what occurred?

A. I got a blowjob . . . from

[fol. 6] Q. From what?

A. A man.

Q. Did you know this man at all?

A. No.

Q. Approximately how old was he?

A. Maybe early thirties, probably.

Q. When you say a blowjob, what do you mean by a blowjob?

A. I put my penis in his mouth and a flow of sperm came from my penis.

Q. On how many occasions did you have these blowjobs in Halifax?

A. I had them twice at that place.

Q. This was when you were about 16 years of age?

A. Yes.

Q. And after these two blowjobs in Nova Scotia, in Halifax, that you mentioned when did you again have a homosexual act?

A. It was on an average of three or four times a year for the next six or seven years in Halifax and in Pictou County.

Q. Was this all prior to your entry into the United States on June 22, 1955?

A. Yes.

Q. These acts that you mentioned that took place on the average of three or four times a year, for the six or seven years prior to your entry into the United States in 1955 were they all blowjobs as you described above, or was there any other variation?

A. No, all blowjobs.

Q. Prior to your entry in the United States did you ever have sexual relations with a woman?

A. Yes.

Q. How often?

A. Three or four times.

Q. Three or four times prior to your entry into the United States. No more?

A. No.

Q. I have been asking you about your homosexual activity and I haven't asked you what you mean by homosexual activity. Could you please explain to me what you mean [fol. 7] by homosexual activity, or homosexual acts?

A. Acts of two people of the same sex.

Q. What type of act?

A. Sexual act.

Q. Since your entry into the United States on June 22, 1955 approximately how many times have you had homosexual relations with other men?

A. On an average of three or four times a year over the seven year period, I think.

Q. Let's see, you came in in 1955, on June, 1955, so it would be about 8½ years.

A. Yes.

Q. Where do you now live?

A. 486 4th Street, Brooklyn.

Q. Do you liye by yourself or with someone else?

A. No, I share an apartment.

Q. With whom?

A. Eugene O'Rourke.

Q. Have you ever had homosexual relations with Eugene O'Rourke?

A. Yes.

Q. When was the last time you had homosexual relations with Eugene O'Rourke?

A. Approximately eight months ago.

Q. Did you have relations . . . how long have you been living with Mr. O'Rourke?

A. Since 1959.

Q. And how often up to eight months ago have you had homosexual relations with Eugene O'Rourke? Approximately?

A. Approximately twice, three times a year.

Q. When was the last time you had homosexual relations with anyone?

A. I think it was in September of 1963.

Q. Where did this take place?

A. In Manhattan.

Q. Do you remember with whom it was?

A. I don't know the name, no. I never did know the name.

Q. And what this involve?

[fol. 8] A. I put my penis in his mouth and a flow of sperm came from my penis. It happened in his apartment.

Q. What type of homosexual acts did you perform with Eugene O'Rourke?

A. The same as I just mentioned with the other one.

Q. By that do you mean blowjob?

A. Yes.

Q. As you described above?

A. Yes.

Q. Is this Mr. O'Rourke an alien?

A. No. He's a U.S. citizen.

Q. He was born in the United States?

A. Yes.

Q. Have you ever had homosexual relations with another man for money?

A. No.

Q. All these homosexual acts that you mentioned up to now, have they ever been other than voluntary?

A. No, all voluntary.

Q. Voluntary on your part and voluntary on the part of the person with whom you were performing the act?

A. Yes.

Q. With regard to the arrest that we spoke of before, when you were arrested in New York on October 2, 1959 on a charge of sodomy, I have here a copy of New York City Police Department Criminal Record which reflects that arrest. Would you please read it and if it does apply to you would you put your name and the date on the back of it?

A. (no answer heard)

Q. Have you registered for selective service since you have been in the United States?

A. Yes.

Q. What is your present classification?

A. (no answer heard)

Q. (Let the record show that the respondent presents Selective Service Notice of Classification in his name Clive Michael Boutilier, Sel. Svce. No. 504233723, reflecting his [fol. 9] classification as 4-F, on Dec. 24, 1957 at the local

board. The local board being No. 42 at 250 Livingston St., Brooklyn, N.Y.)

Could you tell me why they classified you 4-F?

A. I'm homosexual.

Q. Did they just accept your statement that you're a homosexual?

A. After filling out the forms and asking the questions I was sent to see a psychiatrist and as a result I'm classified 4-F.

Q. You mean one of the questions on the form asks whether or not you are a homosexual and you answered Yes?

A. Yes.

Q. Do you have an alien registration card with you?

A. Yes.

(Let the record show that respondent presents his alien registration card (Form I-151A) in the name of Clive Michael Boutilier, A-10 082 545, reflecting his admission to the United States as an immigrant on June 22, 1955 at New York as Type 0-1, and his date of birth as Sept. 3rd, 1933.)

Q. Do you have a social security card with you?

A. Yes. No, excuse me I must have lost it.

Q. Are you presently employed?

A. Yes, I'm employed with Kennecott Copper Corp. here in Manhattan as . . .

Q. As what?

A. As a utility man.

Q. Do you have anything else to add to this statement?

A. No, just that shortly I plan to seek medical help and I guess that's about it. Due to the finances I couldn't get around to get this medical help before this.

[fol. 10] I have read the foregoing statement, consisting of 9 pages, and I state that the answers made therein by me are true and correct to the best of my knowledge and belief, and that this statement is a full, true and correct record of my interrogation on the date indicated by above-

named officer of the Immigration and Naturalization Service. I have initialed each page of this statement and the correction noted on page(s)

.....

Subscribed and sworn to before me at 20 West Broadway, New York, N. Y. on .....

.....

JAMES B. SARSFIELD, Investigator
U.S. Immigration and Naturalization Service.

Witnessed by:

.....

I hereby certify that the foregoing statement, consisting of 9 pages, is a true and correct transcript of the Recorded Belt Material taken in this matter on January 13, 1964.

M. GUERRERO
Stenographer

[fol. 11]

EXHIBIT 4—CERTIFICATION OF USPHS

[Stamp—Imm. & Nat. Service—N.Y.C. Mail Unit—1964 Jan. 20 PM 3:58]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PUBLIC HEALTH SERVICE

[Emblem]

U. S. PUBLIC HEALTH SERVICE HOSPITAL
STATEN ISLAND 4, NEW YORK

C PSY

January 17th, 1964.

To: The District Director
Immigration & Naturalization Service
20 West Broadway
New York, New York.

Subject: Clive Michael Boutilier—A-10 082 545 S-JBS

Dear Sir:

This is to certify that the attached sworn statement in the case of the above named alien has been reviewed by the undersigned.

On the basis of the information contained in this statement it is our opinion that the alien was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence on June 22nd, 1955.

Very truly yours,

/s/ PAUL G. SMITH, M.D.
Paul G. Smith, M.D.
Sr. Surgeon, USPHS
Chief, Psychiatry

/s/ MARIA SARRIGIANNIS, M.D.
Maria Sarrigiannis, M.D.
Medical Director, USPHS

Enclosure

[fol. 12]

EXHIBIT 6—REPORT OF DR. FALSEY

EDWARD F. FALSEY, M. D.
142 JORALEMON STREET
BROOKLYN 1, N. Y.

TRIANGLE 5-5034

March 2, 1964

Mr. Robert P. Brown
320 Broadway
New York, New York

RE: Clive Boutelier
486 4th Street
Brooklyn, New York

Dear Mr. Brown:

Thank you for suggesting that the above patient consult me concerning the difficulties which have arisen in relation to his application for citizenship.

Now 30 years of age, he explained quite frankly that he has been homosexual and that he had one arrest while living in an apartment on 16th Avenue in Brooklyn. At the time of his first interview as well as in subsequent examination on February 16th, this patient gave a complete account of his past and family history, stating that he was born in Shelt Harbor, Halifax County, Nova Scotia, on September 3, 1933. Clive was the eldest son with an older sister, Phyllis, who is now 34, married with 8 children and living in Wellin, Ontario. A brother, Andrew, 28, is married with 2 children in New Jersey. Danny, 26, is married with one child, was in the U.S. Military Service. A sister, Roseanne, now 20, is married and is living in Brooklyn and the youngest brother, Paul, is 18 and makes his home with the patient's mother who is 49 and who is working as a practical nurse. Mr. Boutelier's father died in 1957 of heart disease.

Evidently of good intelligence, this patient is working steadily as a building maintenance man for Kenilworth Company at 161 East 42nd Street. Earlier, he served at attendant and companion to a man who was mentally ill and the patient performed responsibly in the role of companion.

On psychiatric examination of Mr. Boutelier, there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk [fol. 13] of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

I am planning to see him in further interviews and will advise you of subsequent developments.

Very truly yours,

/s/ Edward F. Falsey, M.D.
(Qualified Psychiatrist)

EFF:ms

[fol. 14]

EXHIBIT 7—REPORT OF DR. ULLMAN

MONTAGUE ULLMAN, M. D.
4802 TENTH AVENUE
BROOKLYN 19, N.Y.

DIRECTOR OF PSYCHIATRIC SERVICES
MAIMONIDES HOSPITAL OF BROOKLYN
PROFESSOR OF PSYCHIATRY
STATE UNIVERSITY OF NEW YORK

March 30, 1965

Clinical Abstract BOUTILIER, Clive Michael

Mr. Clive Boutilier is a thirty-two year old, white male seen in consultation on March 30, 1965 at the request of his attorney, Blanch Freedman. Mr. Boutilier was cooperative during the interview but appeared extremely tense and anxious. As soon as he began to speak and from time to time throughout the interview his eyes teared. His initial spontaneous outburst was to the effect that the proceedings against him over the past six years were forcing him to make bank loans and for the first time in his life he was unable to financially cope with what was happening to him.

Mr. Boutilier comes from a family of six siblings raised on a small farm in Canada. He is the second oldest. A sister, aged 34, and a brother, aged 30, are in Canada. The others are all in the States. His three brothers are married. There is no history of any nervous and mental disorder in the family and no history of any sexual problems among any of his siblings. His father died eight years ago. His mother remarried and the patient is now living with his mother and stepfather.

The patient recalls very little about his early years except that everyone had to work to maintain the farm. His own schooling was interrupted at the age of thirteen so that he could contribute to the support of his family. His father

and mother fought a great deal. He felt very close to his mother and tended to take her side in these arguments.

The patient was not aware of any feelings of difference or difficulties of any kind during his childhood. He had no sexual experiences until the age of sixteen when he was apparently seduced by an older man. There followed a period of sporadic occasional experiences, mostly with older men and usually initiated by them. This was the pattern which persisted after coming to the States until [fol. 15] about eight years ago when he moved in with a homosexual male with whom he remained for about seven years. The patient never sought out homosexual contacts or relationships on his own and the occasion on which he was picked up was the only one in which he was involved with a minor.

The patient has had sexual interest in girls and has had intercourse with them on a number of occasions. He has at times become interested in a girl but develops acute anxiety and withdraws when the girl herself has expressed a serious interest. He has abandoned all sexual practices within the past several months because of his annoyance and disgust with the problems these activities have brought about.

Mr. Boutilier has made a good work adjustment in this country. He has held his current job for three years as a maintenance worker with a copper concern. He is well liked, conscientious about his work and concerned with doing a very good job. He has moved back to living with his mother and stepfather and his life at the present time is very circumscribed. His evenings are spent mostly at home. He occasionally goes bowling. He attends mass but otherwise does not go regularly to church.

The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the in-

terview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

I do not believe that Mr. Boutilier is a psychopath.

/s/ Montague Ullman
Montague Ullman, M.D.

MU/eb

[fol. 16]

Before the Immigration and Naturalization Service

Transcript of Hearing on July 26, 1965 Before Special Inquiry Officer

Colloquy Between Special Inquiry Officer and Counsel

Special Inquiry Officer to Respondent:

Q. Sir, do you speak and understand the English language?

A. Yes, sir.

Q. What is your full, true and correct name?

A. Clive Michael Boutilier.

Q. You were previously before me on March 8, 1965 and your hearing was adjourned until today for completion, that is the purpose of the hearing today. Are you still represented by Miss Freedman?

A. Yes.

Q. Will you please stand up and raise your right hand? Do you solemnly swear that the testimony you will give

today will be the truth, the whole truth, and nothing but the truth, so help you God?

A. So help me God.

Special Inquiry Officer: Now, Miss Freedman, Mr. Schiano has been telling me that you and he have apparently reached certain understanding with regard to the evidence and the procedure in this case. I would like to know whether what I have noted down is a correct understanding. The first is that exhibit 3, which is the statement of January 13, 1964, is a correct transcript to what this man testified to with the exceptions that are noted in your letter of May 11, 1965,—

Miss Freedman: That is correct, sir.

Special Inquiry Officer: Which are concerned principally with dates and details.

Miss Freedman: That is correct.

Special Inquiry Officer: All right, the letter of May 11, 1965 will be made part of Exhibit 3. It will be referred to [fol. 17] as Exhibit 3-B. Am I correct also in your client's own statement that the disposition of the criminal matter in 1959 was that he was discharged on his own recognizance?

Miss Freedman: That is correct, and it was later completely dismissed.

Special Inquiry Officer: It was later completely dismissed?

Mr. Brown: Counsel present Robert Brown.

Special Inquiry Officer: Do you have anything Mr. Brown—

Mr. Brown: I do not have a transcript but I can secure that.

Special Inquiry Officer: Were you the attorney in the proceedings?

Mr. Brown: Yes.

Mr. Schiano: I will accept counsel's representation on this.

Special Inquiry Officer: This was dismissed after it was pending six months?

Mr. Brown: Six months after the discharge on his own recognizance.

Special Inquiry Officer: What is your name, counsel?

Mr. Brown: Robert Brown, 305 Broadway, New York 7, N.Y. and I was attorney of record for Mr. Boutilier during those proceedings in Special Sessions Court in Kings County.

Special Inquiry Officer: Now, thirdly, that you wish to submit as psychiatric evidence two letters from two psychiatrists which I have before me. One of March 2, 1964 from Edward F. Falsey, 142 Joralemon Street, Brooklyn 1, New York and one of March 30, 1965 from Montague Ullman, of 4802 Tenth Avenue, Brooklyn 19, New York. Does the Government have any objections to these being made part of the record?

Mr. Schiano: No, except I wish to make the observations of the Government's position where the doctors refer to psychopathic personality that we do not maintain as speaking the same context. We maintain that psychopathic per-
[fol. 18] sonality as referred to in allegation No. 4 and in Exhibit 4 is a statutory and a legal term.

Special Inquiry Officer: All right, with that stated position of the Government they will be made part of the record as Exhibit 6 and Exhibit 7 respectively. I then understand that this is the only psychiatric evidence that you intend to submit, Miss Freedman. Is that correct?

Miss Freedman: That is correct. Pardon me, did you say the numbers were 6 and 7?

Special Inquiry Officer: Is my understanding also correct that the respondent was not examined by the United States Public Health Service and declined to submit to such an examination. Is that correct?

Miss Freedman: That is correct.

Special Inquiry Officer: Is it also my understanding that this psychiatric material, Exhibits 6 and 7 were not submitted to the United States Public Health Service for reconsideration of their findings?

Miss Freedman: It is correct, but I would like the record to reflect that there is absolutely no objections on the part of respondent or respondent's counsel to have that material submitted to Dr. Smith—

Mr. Schiano: I don't think it would change the question that we are getting at here though.

Special Inquiry Officer: Well, as I understand it, and I come now to the last part of the stipulation or understanding, which is, that if this material were submitted to the Public Health doctor, or if he appeared and testified regarding this material, that he would testify that at the time of the respondent's arrival in the United States he had been [fol. 19] a sexual deviate and that under the Regulations of the Public Health Service, the Public Health doctor would be required to certify that he was a psychopathic personality within the meaning of the Public Health Regulations.

Miss Freedman: That is correct.

Special Inquiry Officer: Does that correctly state your position?

Miss Freedman: Yes.

Special Inquiry Officer: And that in view of the fact that there is no serious contest as to whether or not this respondent was a sexual deviate but only as whether he is a psychopathic personality that there would be no useful purpose served in re-submitting it to Public Health or having Public Heath Service appear to testify.

Miss Freedman: That is correct. May I add that I would like your statement to include the Regulation No. 6 of the Manual For Medical Examinations of Aliens so that we would be clear that we are talking about that section which directs that sexual deviates be classified under the term of and in the category of psychopathic personality?

Special Inquiry Officer: All right, we will do better than that, Miss Freedman, we will make a photostatic copy of the applicable page, that would be page 6-5 part of this record as Exhibit 8. Now, is there any or will there be any request for discretionary relief in this case other than termination of proceedings?

Miss Freedman: No, I don't know that he is available for any discretionary relief under these circumstances, unless you are talking about voluntary departure.

Special Inquiry Officer: Well, I think he would have the [fol. 20] same problem basically with either voluntary departure or suspension of deportation. Those appear to be the only two possible remedies but for either of those we would have to be able to reach a conclusion that he has been a person of good moral character during the past five years, at least five years. For suspension it would be longer.

Miss Freedman: I don't see that he is statutorily eligible in the light of these things.

Special Inquiry Officer: I am inclined to agree but I can't foreclose you from making the applications.

Miss Freedman: I am not going to make a meaningless application, sir, so that there is no application for any discretionary relief.

Mr. Schiano: Counsel wanted to make one further observation.

Miss Freedman: I would like to make a further observation if I might with respect to the subject dealing with the Regulation 6 (a) and (b), and mainly, that in this case sexual deviation is homosexuality.

Special Inquiry Officer: In other words you are making the point that there might be other types of sexual deviation which would be more, let's say, consonant with psychopathic personality, or diagnosed as psychopathic personality?

Miss Freedman: Correct.

Special Inquiry Officer to Respondent:

Q. Now, Mr. Boutilier, if you should have to be ordered deported, you have a right under the law to say to which country you would prefer to be sent. In such case to which country would you prefer to be sent?

A. Canada.

Q. Is there any reason why you fear to return to Canada? [fol. 21] A. No, sir.

Special Inquiry Officer: Miss Freedman, I think perhaps the facts in this matter ought to be brought up-to-date with regard to any criminal records, present occupation, activities or anything of that sort. Would you do that, please?

Miss Freedman to Respondent:

Q. Mr. Boutilier, are you working in the same place you worked when you last appeared here?

A. Yes, ma'am.

Q. Will you give them the name of the place?

A. Kennecott Copper Corporation, 122 East 42nd Street, Manhattan.

Q. And you have been there consistently employed for approximately how long?

A. Approximately two and a half years.

Q. Now, with respect to your residence, I believe since you were last here or at some point since the statement was last taken, you changed not the apartment house that you lived in but the apartment within which you dwell. Is that correct?

A. Yes, ma'am. I now live with my parents.

Q. You no longer have an apartment of your own. Is that correct?

A. No, ma'am.

Q. Have you at any time been arrested for any offense, crime or other activity that is not part of this record?

A. No, ma'am.

Q. Did you ever leave the country since 1959 or since you were last here?

A. The last time I left the country was for my father's funeral on April 27, 1959.

[fol. 22] Special Inquiry Officer: Well, as I understand it from the record, the last absence from the United States was 1957?

Miss Freedman: No, the last was 1959 when he attended his father's funeral in 1959, April 25, 1959.

Mr. Schiano: Exhibit 3 recites 1957 and exhibit 3 was corrected to 1959.

Miss Freedman: That is right. That was the last.

Special Inquiry Officer: Is it also— And the return was when?

Miss Freedman: The same day in 1959.

Special Inquiry Officer: This was just for one day?

Miss Freedman: That is right.

Special Inquiry Officer: Is it agreed that if the Public Health were making their diagnosis with regard to the 1959 entry rather than the 1955 entry that they would make the same finding?

Miss Freedman: That is correct.

Mr. Schiano: We would enter the same stipulation on the basis of that entry as well.

Special Inquiry Officer: In other words I think it would be rather silly at this point to re-submit the evidence to Public Health and ask them to re-certify as to the 1959 entry rather than the 1955 entry?

Miss Freedman: Correct.

Special Inquiry Officer: All right, then I will take the last entry as April 25, 1959. Do you have anything further, Mr. Schiano?

Mr. Schiano: No, sir.

Special Inquiry Officer: All right then, this hearing will be closed and I will reserve decision and render my decision in writing.

[fol. 23]

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A-10 082 545—New York, N.Y.

In the Matter of

CLIVE MICHAEL BOUTILIER, Respondent,

In Deportation Proceedings.

DECISION OF SPECIAL INQUIRY OFFICER—August 5, 1965

Charge:

I & N Act—Section 241(a)(1) (8 USC 1251(a)(1))—excludable at time of entry; psychopathic personality, Section 212(a)(4) I & N Act.

Application:

Termination of proceedings.

In Behalf of Respondent:

Blanch Freedman, Attorney-at-law, 299 Broadway, New York, N.Y.

In Behalf of Service:

Vincent A. Schiano, Trial Attorney, New York, N.Y.

[fol. 24] The respondent is a 31 year old single male alien, a native and citizen of Canada who last entered the United States at New York, New York on or about April 25, 1959 at which time he was returning from a short trip to Canada. The record further establishes that the respondent was admitted to the United States at New York, New York on June 22, 1955 as a nonquota immigrant, in possession of

an immigrant visa issued to him by the American Consulate General at Toronto, Canada.

The order to show cause charges that the respondent is deportable from the United States under Section 241(a)(1) of the Immigration and Nationality Act by reason of the fact that at the time of his entry on June 22, 1955 he was an alien afflicted with a psychopathic personality, to wit, a sexual deviate.

This allegation of deportability is based on a certification by the United States Public Health Service dated January 17, 1964 (Exhibit 4) that at the time of the respondent's admission to the United States for permanent residence on June 22, 1955 he was an alien afflicted with a Class A condition, namely, psychopathic personality, sexual deviate.

It was stipulated and agreed between the Trial Attorney and the attorney for the respondent that the same certification would be made by the United States Public Health Service in relation to the respondent's most recent entry into the United States on April 25, 1959 and that no useful purpose would be served by re-submitting the evidence to the United States Public Health Service merely for the [fol. 25] purpose of having them issue a new certification relating to the 1959 arrival rather than the 1955 arrival.

The certification by the United States Public Health Service was based on a sworn statement taken from the respondent on January 13, 1964 (Exhibit 3). It was stipulated and agreed by the attorney for the respondent that this record of sworn statement correctly reflected the respondent's testimony on January 13, 1964 with certain minor exceptions relating to dates which are set forth in detail in Exhibit 3-B.

It was further stipulated and agreed between the Trial Attorney and the attorney for the respondent that the respondent declined to submit himself for personal examination by the United States Public Health Service, that the respondent did not intend to submit the personal psy-

chiatric testimony of a psychiatrist, although he has submitted the written opinion of two psychiatrists, Dr. Edward F. Falsey (Exhibit 6) and Dr. Montague Ullman (Exhibit 7), both of whom concede that the respondent has been a homosexual for a number of years but conclude that by reason of such sexual deviation the respondent is not a psychopathic personality.

It was further stipulated and agreed between the Trial Attorney and the attorney for the respondent that no useful purpose would be served by submitting this additional psychiatric material to the United States Public Health Service because these reports did not in any way raise an issue as to the respondent's sexual deviation, and that furthermore if the United States Public Health Service doctors who issued the certificate of January 17, [fol. 26] 1964 were to appear in the course of these proceedings for examination, they would testify that the respondent prior to his arrival in 1955 and subsequent thereto until date has been a sexual deviate of the homosexual type and that under the applicable regulations of the United States Public Health Service (as set forth in Exhibit 8) they are required to issue a Class A certificate that the respondent was afflicted with a psychopathic personality at the time of his arrivals in the United States because he was a sexual deviate.

The attorney for the respondent has waived the personal appearance and cross examination of the United States Public Health Service doctors on the basis of her understanding that this would be their testimony and has in fact been their testimony in all the similar cases where they have appeared for cross examination.

In substance, therefore, the attorney for the respondent is raising the purely legal question of the sustainability of the charge contained in the order to show cause and has applied for no form of discretionary relief from deportation.

Exhibit 3 establishes that the respondent began his homosexual activities at the age of fourteen and from the age

of sixteen to the date of his first entry into the United States, about six years later, he engaged in homosexual activities on an average of three or four times a year. After his entry into the United States on June 22, 1955 he continued to have homosexual relations with other men with about the same frequency as before. For about seven years since his arrival in the United States he shared an [fol. 27] apartment with another man of homosexual inclination with whom he also had homosexual relations.

No serious question has been raised either by the respondent, his counsel or the psychiatrists who have submitted reports on the respondent as to his sexual deviation.

The record further establishes that the respondent was arrested on October 2, 1959 and charged with sodomy, which charge was reduced to assault and after six months dismissed because of the absence of the complaining witness.

The sole question which has been raised is the propriety of the United States Public Health Service following its regulations and concluding that the respondent is mandatorily classifiable as a psychopathic personality once he has been found to be a sexual deviate.

The text of Senate Report No. 1137 (82nd Congress, 2nd Session, January 29, 1952) indicates that the Public Health Service advised Congress that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect is sufficiently broad to provide for the exclusion of homosexuals and sex perverts and that the change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates. Whatever the phrase "psychopathic personality" might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts.

It may well be that in psychiatric circles the term "psychopathic personality" does not have a precisely defined connotation and that those connotations which might be [fol. 28] agreed upon by the majority of psychiatrists do not, even in the view of those psychiatrists, follow inevi-

tably from any finding of homosexuality or sexual deviation.

However, we are not here concerned with the niceties of meaning indulged in by psychiatrists, but rather with words of legal art which, whatever they may mean elsewhere, to the Congress which enacted the Immigration and Nationality Act included homosexuality and sex perverts as those terms are commonly understood. Accordingly, I find that the Government has sustained its burden of establishing that the respondent is deportable on the charge contained in the order to show cause. The respondent has indicated that if ordered deported he wishes to be sent to Canada and has no fear of returning to that country.

Order: It Is Ordered that the respondent be deported from the United States to Canada on the charge contained in the order to show cause.

Ira Fieldsteel, Special Inquiry Officer.

[fol. 29]

U. S. Department of Justice

Board of Immigration Appeals

Order and Decision of Board of Immigration Appeals—January 12, 1966

January 12, 1966

File: A-10082545—New York

In re: Clive Michael Boutilier

In Deportation Proceedings

Appeal

Oral Argument: November 3, 1965.

On behalf of respondent: Blanch Freedman, Esq., 299 Broadway, New York, New York 10007.

On behalf of I&N Service: R. A. Vielhaber, Esq.

Charges:

Order: Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1))—Excludable at time of entry; psychopathic personality, Section 212(a)(4), I&N Act.

Lodged: None.

Application: Termination of proceedings.

Respondent appeals from the order of the special inquiry officer requiring his deportation upon the charge stated in the caption. The appeal will be dismissed.

Respondent, a 32-year-old single male, a native and citizen of Canada, was admitted for permanent residence on June 22, 1955 and last entered the United States on about April 25, 1959 after a one day visit to Canada. The Service charges that at the time of respondent's original entry he [fol. 30] was a homosexual and was, therefore, excludable as a psychopathic personality. No serious question is raised as to whether respondent was a homosexual at the time of his admission for permanent residence. Counsel's basic contentions are that Congress did not intend to exclude homosexuals who were not also psychotic and that the term "psychopathic personality" as applied by the Board is void for vagueness.

The arguments advanced by counsel in her scholarly brief are similar to those previously considered by the Board in other cases in which we have held that the term "psychopathic personality" is a term of art under the immigration laws and that it includes an alien upon mere proof that he is a homosexual (*Matter of La Rochelle*, A-7128195, December 1, 1965, Int. Dec. ——; *Matter of Lavoie*, Int. Dec. 1481; *Matter of R-*, 9 I&N Dec. 393; *Matter of S-*, 8 I&N Dec. 409; *Matter of P-*, 7 I&N Dec. 258). Further evidence that it was the intent of Congress to include the sexual deviate in the category of the psychopathic personality is shown by the recent action of Congress in making "sexual deviation" a ground of exclusion to resolve any doubt that a homosexual was to be excluded (H.R.

Rep. No. 745, 89th Cong., 1st Sess. 16; S.Rep. No. 748, 89th Cong., 1st Sess. 18-19). This action which counsel views as only an expression of current thinking is in our opinion a clarification of what was intended in the prior law. We, therefore, think it proper to sustain the charge here upon proof of the existence of only a homosexual condition.

Counsel contends the Board's interpretation renders the statute void for vagueness. We believe the interpretation is required by the history of the act and judicial interpretations; the constitutional aspect is not one we are authorized to rule upon.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

[fol. 31]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 429—September Term, 1965.

(Argued June 2, 1966.)

Docket No. 30274

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: Moore, Smith and Kaufman, Circuit Judges.

OPINION—July 8, 1966

Petition for review of an order directing petitioner's deportation as one who upon entry into this country was

a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigration and Naturalization Act of 1952, 8 U. S. C. (1964 ed.) §1182(a)(4).

Dismissed.

Blanch Freedman, New York, N. Y. (David M. Freedman, on the brief), for petitioner.

[fol. 32] Francis J. Lyons, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James G. Greilsheimer, Special Assistant United States Attorney, on the brief), for respondent.

KAUFMAN, Circuit Judge:

Although a relatively young segment of contemporary society prides itself on its readiness to cast off conventional and tested disciplines and to experiment with nonconformance and the unorthodox merely to act out its contempt for traditional values, certain areas of conduct continue to be as controversial in modern and *beau monde* circles as they were in bygone and more staid eras. Homosexual behavior, despite Sigmund Freud[1] and other noted authors,[2] remains such a fervently debated issue that too often emotions on both sides obscure reason. But, the craft of judging requires a personal detachment—as far as it is humanly possible—so that issues which are apt to overwhelm the emotions may be approached in the dispassionate manner fitting for a judicial determination.

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[1] "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." Freud, "Letter to an American Mother," published in 107 Am. Jour. Psych., 786-87 (1951).

[2] Kinsey, Sexual Behavior in the Human Male, 623 (1948).

See Learned Hand, "Fifty Years of Federal Judicial Service," published in Handbook for Judges (1961). Our function in this case, therefore, is not to approve or disapprove of the conduct we are examining; nor is it necessary for us to determine the mores of the community. [fol. 33] Rather, our duty is simply to interpret a statute and to make the traditional determination as to its application.

I.

Clive Michael Boutilier petitions for review of a final order of the Board of Immigration Appeals directing his deportation to Canada as one who upon entry into this country was a homosexual and, thus, was afflicted with a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigration and Naturalization Act of 1952 (Act), 8 U. S. C. (1964 ed.) §1182(a)(4).* For the reasons set forth below, we uphold the order of the Board and dismiss the petition for review.

The basic facts, which were not seriously disputed, lend themselves to simple statement. Boutilier, a native and citizen of Canada, was admitted into the United States for permanent residence on June 22, 1955 at the age of 21. Since that time, with the exception of short trips outside the country, he has continuously resided here and has been gainfully employed as a building maintenance man, most recently by a large company in Manhattan. Boutilier's mother and step-father also live in New York and three of his five brothers and sisters reside in the United States.

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*Section 212(a) provides in pertinent part:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; . . .

In September 1963, as part of Boutilier's application to file a petition for citizenship, he submitted an affidavit to a naturalization examiner forthrightly admitting that he had been arrested in October 1959 on a charge of sodomy, [fol. 34] in violation of New York Penal Law, §690. Boutilier noted that he had been discharged on his own recognizance and that the charge was reduced to simple assault and ultimately dismissed when the complaining party failed to appear in court. Boutilier freely acknowledged that the circumstances leading to the arrest involved acts of anal sodomy and fellatio with a minor—a 17-year-old male.

This affidavit was forwarded to the Immigration Service and, in January 1964, an Immigration Officer informed Boutilier that the government desired additional information. Submitting another sworn statement, Boutilier revealed the full history of his sexual deviate behavior. He stated that his first homosexual experience occurred in Canada when he was approximately 14 years of age; the act was involuntary and Boutilier played a passive role. However, from the time he was 16 until he came to the United States 5 years later, Boutilier voluntarily engaged in homosexual activity on an average of 3 or 4 times a year.[4] These experiences all involved fellatio and Boutilier was generally the active participant. After Boutilier entered this country in 1955, his homosexual conduct continued with approximately the same frequency. Indeed, Boutilier shared an apartment with a male with whom he had sexual relations and, as the result of Boutilier's admitted homosexual condition and a Selective Service psychiatric examination, he was classified 4-F by the Selective Service System.

Immigration officials dispatched this second and more complete statement to the United States Public Health Service for its expert views as to whether there were grounds for concluding that Boutilier was excludable from

[4] Boutilier acknowledged that, occasionally, he also engaged in heterosexual conduct.

[fol. 35] the United States when he entered in 1955. After reviewing this document, the Public Health Service issued a certificate stating that, on the basis of the information furnished, it was of the opinion that Boutilier "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence on June 22nd, 1955."[5]

Armed with this certificate and the supporting documents, the government commenced deportation proceedings. At hearings held before a Special Inquiry Officer, Boutilier declined an opportunity for an *in personam* examination by Public Health Service doctors. He did, however, introduce two letters[6] from privately retained psychiatrists which were received in evidence without objection by the

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[5] The certificate was signed by Paul G. Smith, M.D., Senior Surgeon, United States Public Health Service, Chief of Psychiatry and by Maria Sarrigiannis, M.D., Medical Director, United States Public Health Service.

[6] One letter was signed by Edward F. Falsey, M.D. and dated March 2, 1964. It stated:

> On psychiatric examination of Mr. Boutelier [*sic*], there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

The second letter was in the form of a "Clinical Abstract" on the stationery of Montague Ullman, M.D., under date of March 30, 1965. In pertinent part, it stated:

> [Boutilier's] sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interest as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

[fol. 36] government.[7] In addition, it was substantially agreed between the parties that this additional material would not cause the Public Health Service to change its certification and, accordingly, no purpose would be served by calling a Public Health Service doctor to testify. Based on the evidence and stipulations, the Special Inquiry Officer concluded that Boutilier had been a homosexual at the time of entering the United States and, thus, was excludable as one afflicted with a "psychopathic personality." On this basis, the Special Inquiry Officer ordered Boutilier deported, noting that the phrase "psychopathic personality" as used in section 212(a)(4) of the Act is not a medical formulation but is a legal term of art evincing a Congressional purpose to exclude from this country any alien who is shown to be a homosexual. After an unsuccessful appeal to the Board of Immigration Appeals, Boutilier asks us to vacate the order of deportation.

II.

Boutilier now urges that an actual medical examination by the Public Health Service was an indispensable prerequisite to its opinion that he was afflicted with a "psychopathic personality."[8] In support of this position, Boutilier relies on section 234 of the Act, 8 U. S. C. §1224, which directs that certification of the physical and mental condition of "arriving aliens . . . shall be made by medical [fol. 37] officers of the United States Public Health Service, who shall conduct all medical examinations and shall cer-

[7] The government noted, however, that it considered the phrase "psychopathic personality" appearing in Dr. Ullman's letter to be used in a medical frame of reference and not as a legal term of art.

[8] It could be urged that Boutilier is estopped from making this contention in view of his rejection of the government's offer to have the Public Health Service conduct an *in personam* examination. But, in view of the serious consequences of a deportation order and the government's failure to press this point, we shall make our determination on the merits.

tify, for the information of the immigration officers and the special inquiry officers, any physical or mental defect or disease observed . . . " See also 42 C. F. R. §34.1. Boutilier urges that if an exclusion proceeding is to be valid, adherence to these procedures is required. See *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949).

While this contention possesses surface plausibility, it is spurious and has a fatal flaw: it glosses over the basic and fundamental distinction between exclusion and deportation proceedings. Boutilier's ouster was directed because he was "excludable" in 1955 as one afflicted with a "psychopathic personality." But, this is not to say that the process by which his expulsion was ordered was an exclusion proceeding. On the contrary, section 241(a) of the Act, 8 U. S. C. (1964 ed.) §1251(a), expressly provides that "any alien in the United States . . . shall . . . *be deported* who . . . at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . . " (emphasis added).

Thus, section 234 and the cases and regulations which Boutilier cites are not in point; they describe requirements which are applicable solely to exclusion proceedings and have nothing to do with deportation procedures—our main concern here and the path to be followed is laid down in section 242(b) of the Act, 8 U. S. C. §1252(b). We note, in this connection, that Boutilier does not claim that the government failed to comply with the rules and regulations which guide the conduct of deportation proceedings.

The confusion between "exclusion" and "deportation" is also at the root of Boutilier's argument that he is being expelled on a non-statutory ground. Boutilier asserts that while affliction with a "psychopathic personality" may [fol. 38] furnish a basis for exclusion, this term does not authorize deportation. We find no merit in this suggestion. Section 241, as we have noted, authorizes the deportation of any alien who could have been excluded upon entering the United States. While this form of "delayed exclusion" has not been altogether free from criticism, see *Note, Limita-*

tions on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry, 68 Yale L. Jour. 931, 935 (1959), without the provision, an imprimatur would be placed on deception of immigration officials at time of entry. *Developments in the Law: Immigration and Nationality,* 66 Harv. L. Rev. 643, 682 (1953). The function served by deportation in cases where the petitioner was excludable is to furnish a backstop or check designed to intercept those whom Congress believed should not have been admitted into the United States in the first instance.

III.

Despite Boutilier's arguments to the contrary, we believe the term "psychopathic personality" as employed in section 212(a)(4) reflects a Congressional purpose to prevent alien homosexuals from obtaining admission into this country. It was employed as a term of art to be interpreted by what Congress intended as a guide, and not to be left to the vagaries and honest but conflicting theories of psychiatry for determination.[9] The legislative history of the Act of 1952 and of the various bills and resolutions which gave rise to it leaves no room for doubt that Congress intended [fol. 39] to exclude homosexuals and would have expressly so provided if the Public Health Service had not advised that the term "psychopathic personality" alone was sufficient to accomplish this result.

Prior to 1952, the Immigration laws employed the language "persons of constitutional psychopathic inferiority," as those subject to exclusion, section 3 of the Act of February 5, 1917, 39 Stat. 875; but, the 1952 Act changed this

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[9] It is also interesting that some psychiatrists have recently used the term "sociopath" in lieu of "psychopathic personality." See Hinsie & Campbell, Psychiatric Dictionary, 600, 682 (Third Ed. 1960). And, psychiatrists, at times, have changed their minds, as to whether "psychopathic personality" constitutes a "mental disease or defect" for purposes of determining criminal responsibility. See *Blocker* v. *United States,* 288 F. 2d 853, 860 (D. C. Cir. 1961), Burger, *J.* (concurring).

terminology to the more modern concept of "psychopathic personality." Initially, the Senate Committee on the Judiciary reported that "the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mental defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., 345 (1950).

As a result, a series of proposed bills were drafted, each of which provided for the exclusion of "aliens afflicted with psychopathic personality" and "aliens who are homosexuals or sex perverts." See, e.g., S. 3455, 81st Cong., 2d Sess., §212(a) (1950); S. 716, 82d Cong., 1st Sess., §212(a) (1951). In S. 2550, 82d Cong., 2d Sess., §212(a) (1952), however, express reference to "aliens who are homosexuals or sex perverts" was eliminated for the following reason:

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is suffi- [fol. 40] ciently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* S. Rep. No. 1137, 82d Cong., 2d Sess., 9 (1952) (emphasis added).

While S. 2550 was not enacted, the report accompanying H. R. 5678, the bill which ultimately became the Act of 1952, contained similar reference to observations by the Public Health Service. Commenting on the medical aspects of a predecessor bill (H. R. 2379, 82d Cong., 1st Sess.,

§212(a) (1951)), which had placed "homosexuals or sex perverts" in a separate excludable category, the Public Health Service recommended that this separate rubric be eliminated and that the phrase "psychopathic personality" —the terminology ultimately enacted—be employed. The Service noted that this phraseology would satisfy the Congressional objective of excluding homosexuals and perverts because ordinarily sexual deviation was a manifestation of a psychopathic personality. In reporting out the bill, which was to become the 1952 Act, the House Judiciary Committee indicated that, with an exception not here relevant, it had accepted the Public Health Service's recommendations. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-48 (1952).

Thus, on the basis of this brief survey of the legislative history of section 212(a)(4), it seems fairly clear that Congress utilized the phrase "psychopathic personality" not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States. "[W]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here." *Quiroz* [fol. 41] v. *Neelly*, 291 F. 2d 906, 907 (5th Cir. 1961). See also, *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S. D. N. Y. 1959), *affirmed without opinion sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (2d Cir.), *cert. denied*, 364 U. S. 824 (1960); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412-413, n. 2 (2d Cir. 1954) (concurring opinion).[19]

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[19] Indeed, because of contrary interpretations in the Ninth Circuit, discussed in section IV of this opinion, *infra*, Congress recently amended section 212(a)(4) to provide expressly what its reports have said over and over again—that "sexual deviates" are excludable. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919. The committee reports of both houses state:

> To resolve any doubt the Committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill. H. R. Rep. No. 745, 89th Cong., 1st Sess., 16 (1965). S. Rep. No. 748, 89th Cong., 1st Sess., 19 (1965).

Our review of the legislative history of section 212(a)(4) also disposes of Boutilier's contention that the Public Health Service exceeded its statutory authority by classifying all homosexuals as persons "afflicted with psychopathic personality." Paragraph 6-b of the United States Public Health Service Manual provides that in the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." While some psychiatrists believe that all homosexuals cannot properly be termed psychopaths,[11] Paragraph 6-b also notes that the phrase "psychopathic personality" is a "legal" term. Moreover, as we have observed, since Congress in- [fol. 42] tended to exclude homosexual aliens, the Public Health Service cannot be faulted for implementing this statutory purpose by utilizing an automatic rule which functions in such a way as to accomplish this objective.[12]

IV.

Placing principal reliance on *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 37 U. S. 449 (1963), Boutilier vigorously maintains that section 212(a)(4) is void for vagueness and that the order direct-

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[11] See, e.g. n. 6, *supra*.

Dr. Paul G. Smith who signed the certification of Boutilier's condition as a "psychopathic personality" testified that modern psychiatric theory does not espouse the proposition that a sexual deviate is *ipso facto* a constitutional psychopathic inferior or a psychopathic personality. *Matter of Anne-Lise Coppo*, a deportation proceeding, file No. A-6845593—New York (December 8, 1965).

But, as we have noted, in the context of this case, psychiatric definitions are not determinative of the legal purport of the term "psychopathic personality."

[12] We also reject Boutilier's contention that there was insufficient evidence of his "psychopathic personality" at the time of his entry into the United States to justify deportation. Boutilier's sworn statement describing in detail his homosexual activities in Canada provided more than ample proof of his excludable condition.

ing his deportation deprived him of due process. The Court of Appeals for the Ninth Circuit has found this argument persuasive and, citing *Fleuti*, has recently adhered to this view in a *per curiam* opinion, *Lavoie* v. *Immigration and Naturalization Service*, —— F. 2d —— (9th Cir. 1966). At the heart of Boutilier's argument is the notion that the term "psychopathic personality" lacked sufficient precision to convey adequate warning to him that post-entry homosexual conduct was proscribed. Upon examining the rationale of the void-for-vagueness doctrine, however, we conclude that it is inapplicable to section 212(a)(4).

Although it is a legal fiction that everyone is presumed to know the law, that precept does not always come to the aid of the prosecutor nor work against the transgressor. A corollary of this doctrine is that legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves. "The underlying principle is that no man shall be held criminally responsible for conduct which he could [fol. 43] not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). While the void-for-vagueness doctrine is principally employed in the interpretation and application of criminal statutes, it is also relevant in considering legislation imposing civil sanctions. *Jordan* v. *De George*, 341 U. S. 223 (1951);[12] *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925); *Miller* v. *Strahl*, 239 U. S. 426 (1915); see generally, *Note, Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

We do not quarrel with Boutilier's contention that the term "psychopathic personality" is not a model of clarity.

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[12] In *De George*, the Supreme Court determined that the phrase "moral turpitude" appearing in the predecessor of section 241, 8 U. S. C. §1251(a) was not unconstitutionally vague. Significantly, section 241 which authorizes deportation of aliens who are convicted of at least two crimes involving "moral turpitude" attempts, unlike section 212(a)(4), to regulate post-entry conduct.

There is no denial that Congress sought assurance that the phrase would encompass homosexuals and sex perverts.[14] And, while the Public Health Service counseled that "psychopathic personality" was sufficiently broad to fulfill the Congressional objective of excluding sexual deviates, the Service candidly advised that, in terms of medical reference, the definition was "vague and indefinite," and that "no more appropriate expression can be suggested at this time." H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-47 (1952).

But all this does not establish that section 212(a)(4) is defective under the void-for-vagueness doctrine. The provision was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics.* Had Boutilier, after entering the United States in 1955, commenced leading a life of impeccable morality, section [fol. 44] 212(a)(4) would still have been applicable to authorize his deportation. And, we emphasize that the section does not focus on Boutilier's post-entry behavior but on his condition at the time of entry into the United States. It is beyond contest that he was a homosexual long before leaving Canada. It is not without significance also that in *Fleuti,* the Court noted "the examining officer chose to rely heavily upon post-entry behavior." It may well be that the Court found it necessary, therefore, to determine whether the term "psychopathic personality" was sufficiently precise to afford adequate warning to Fleuti. In the case before us, however, while the Special Inquiry Officer credited Boutilier's sworn statement which described in detail the full history of his homosexual behavior, there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition. For these reasons, we do not consider *Fleuti* authoritative, and we believe that the order directing Boutilier's deportation did not constitute a denial of due process on the void-for-vagueness doctrine or any other

[14] See discussion of the legislative history of section 212(a)(4), *supra.*

grounds. We find that the clear design of Congress was to exclude homosexuals from entry into the country and this it has done in section 212(a)(4) by the use of the words "psychopathic personality." It is not our function to sit in judgment on Congress' wisdom in enacting the law. "Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired [the law] . . ."[11] L. Hand, "The Contribution of an In-
[fol. 45] dependent Judiciary to Civilization," published in The Spirit of Liberty (1953).

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[11] The dissent, while possessing *ad hominem* appeal, falls into error by improperly shifting the focus from a legal exegesis to a medical explanation of the term "psychopathic personality." As Judge Moore noted in his dissent in *United States ex rel. Paktorovics* v. *Murff*, 260 F. 2d 610, 618 (2d Cir. 1958), "emotional reaction should not blind us to the fact that our immigration policy has been, and still should be, declared by Congress, and enforced by such officers of government as are so designated by Congress." Unfortunately, our dissenting colleague has failed to follow his own caveat.

Although his plea for "clemency" is quite moving, it is illustrative of the ease with which one can succumb in a case such as this to the temptation of permitting the emotions to overwhelm reason and enacted law. Congress has made its judgment, for better or worse, respecting the exclusion of homosexuals which we are not at liberty to alter. The dissent's parade of distinguished historical personages allegedly possessing homosexual attributes does not detract one iota from that conclusion. Indeed, under the current version of section 212(a)(4), see n. 10, *supra*, there is little doubt that some of these eminent gentlemen would be excludable.

Thus, while the house of horrors erected by our dissenting brother stimulates the imagination and arouses our sympathy, it is largely irrelevant. Congress studiously avoided turning this into a medical problem and did not authorize immigration officials to conduct a detailed psychiatric examination into the nature, frequency and variety of a particular homosexual's acts; rather, it enacted a clearcut rule of law: it determined that pre-entry homosexual behavior was to be a ground for exclusion. And, neither citations to the Sonnets of Michelangelo and Campanella, to the New York Times, nor even to Annie Get Your Gun will aid us in our statutory interpretation or change this simple fact of life.

We have considered Boutilier's other contentions and find them to be without merit.

The petition for review is dismissed.

MOORE, Circuit Judge (dissenting):

The majority upholds the deportation of a young man who arrived in this country in 1955, who has worked hard and gainfully ever since, who is respected in his work, and most of whose close relatives—including his mother, his stepfather, and three of his five brothers and sisters—reside in this country. The majority does so on the grounds that at the time the petitioner entered this country at the age of 21, he could have been excluded as one "afflicted with psychopathic personality" under §212(a)(4) of the [fol. 46] Immigration and Nationality Act, 8 U. S. C. §1182(a)(4), since he had had a number of homosexual experiences before coming to this country. The majority manifestly agrees with the Board of Immigration Appeals "that the term 'psychopathic personality' is a term of art and that it includes an alien upon mere proof that he is a homosexual."

Petitioner's homosexual experiences were revealed not in any proceeding at the time of original entry but solely as a voluntary disclosure some 8 years after entry (September 1963) in connection with a petition for naturalization. The admission of an arrest for sodomy in October 1959 (charge reduced and ultimately dismissed) led to a request for further information which petitioner again supplied voluntarily. The most adverse conclusion which can be derived from petitioner's statements is that petitioner engaged in sexual activity on a quite infrequent basis with both men and women during the five-year period before his coming to the United States.

Both the procedure and the statutory interpretation used by the immigration authorities in this deportation proceeding are not only offensive to, but, in my opinion, completely lacking in, due process, for interrelated reasons.

Appellant was adjudged "afflicted with psychopathic personality" without any formal examination by qualified psychiatrists. The majority states that appellant's history was referred to the Public Health Service "for its expert views as to whether there are grounds for concluding that Boutilier was excludable . . ." The word-picture suggests a careful and particularized analysis by distinguished psychiatrists to determine whether appellant was so disturbed as to be "afflicted with psychopathic personality." Nothing could be further from what actually happened. The Public Health Service simply looked at appellant's statement in [fol. 47] which he admitted having had homosexual experiences before he came to this country, and automatically stamped him a "psychopathic personality, sexual deviate," following the directive of the Public Health Service manual that under the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." This was not the result of process, "due" or otherwise; it was the result of a mere fiat in a Public Health Service manual which labels as "psychopathic personalities" many who upon proper psychiatric examination might be found to possess no psychopathic symptoms.[1]

This lack of careful case-by-case determination cannot be upheld simply because this is a proceeding to deport rather than a proceeding to exclude. If anything, greater procedural safeguards are constitutionally required in cases of deportation than in cases of exclusion, because of the greater hardship involved in uprooting an alien from a country once he has developed economic and social ties there and slackened or severed those which bound him to his country of origin. Compare *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950) (alien can be excluded without a hearing) with *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903) (alien sought to be deported

[1] See footnote 11 of the majority opinion.

is constitutionally entitled to a hearing) and *Kwong Hai Chew* v. *Colding*, 244 U. S. 590 (1953) (resident alien seeking re-entry is constitutionally entitled to a hearing); see also *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950) (administrative hearing in deportation case must conform to the requirements of the Administrative Procedure Act).

The lack of careful—in fact the lack of any—medical examination and analysis was not peculiar to the proceedings against the present petitioner, but results from a long-[fol. 48] standing statutory interpretation, promulgated by the immigration authorities and embodied in the Public Health Service manual, that mere proof of homosexuality constitutes a demonstration of the existence of "psychopathic personality." Under such circumstances, it would have been futile for the petitioner to request an examination by a board of Public Health Service doctors.

I cannot impute to Congress an intention that the term "psychopathic personality" in the 1952 amendments of the Immigration and Nationality Act be construed to cover anyone who had ever had a homosexual experience. Professor Kinsey estimated that "at least 37 per cent" of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age. Kinsey, Pomeroy & Martin, Sexual Behavior in the Human Male 623 (1948). Earlier estimates had ranged from one per cent to 100 per cent. *Id.* at 616-622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain.[2] To label a group so large "excludable aliens" would be tantamount to saying that Sappho,[3] Leonardo da

[2] N. Y. Times, July 6, 1966, §1, p. 7, col. 1.

[3] Whom Plato called the Tenth Muse. Loeb Classical Library, Greek Anthology, Vol. 3, p. 281. See Patrick, Sappho and the Island of Lesbos (1912).

Vinci,[4] Michelangelo,[5] Andre Gide,[6] and perhaps even Shakespeare,[7] were they to come to life again, would be [fol. 49] deemed unfit to visit our shores. Indeed, so broad a definition might well comprise more than a few members of legislative bodies.[8]

At most, the legislative history of the 1952 amendments indicates that Congress intended to exclude those who were "sexual deviates" at the time of entry into this country, see S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952). The term "sexual deviate" suggests someone with a long-lasting and perhaps compulsive orientation towards homosexual or otherwise "abnormal" behavior. The Public Health Service report on which the House Judiciary Committee relied in its discussion of the bill as finally enacted, see H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-8 (1952), indicates a narrower definition of the term "psychopathic personality." That report states that "psychopathic personalities" are "disorders of the personality . . . characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior," and that those "psychopathic personalities" who are "ill primarily in terms of society and the prevailing culture . . . frequently [evidently not always] include those . . . suffering from sexual deviation." U. S.

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[4] See The Notebooks of Leonardo da Vinci 189, 223 (P. Taylor ed. 1960).

[5] *Cf.* Sonnets of Michelangelo and Campanella (J. A. Symonds trans. 1878).

[6] *Cf.* Gide, L'Immoraliste (1902).

[7] See, *e.g.*, Sonnets 20, 33, 108.

[8] *Cf.* remarks of Sir Cyril Osborne, opposing reintroduction into the House of Commons of the current British bill on homosexuality: "If this House were representative of the country, then there would be at least 30 homos in this House." Upon being asked to name them, however, Sir Cyril stated that in his 21 years in Parliament he had never encountered "one case of a homo in this House." N. Y. Times, July 6, 1966, §1, p. 7, col. 1.

Code Cong. & Ad. News 1700-1701, 82d Cong., 2d Sess. (1952). This legislative history suggests that Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a "disorder of the personality" as to constitute "psychopathic personality." [fol. 50] Even assuming that Congress intended the term "psychopathic personality" to cover anyone who was a sexual deviate at the time of entry, petitioner had no way of knowing that "psychopathic personality" meant what Congress intended it to mean. "Psychopathic personality" may not be so vague as to be meaningless in all applications, as some have suggested, see Note, Limitations on Congressional Power to Deport Resident Aliens as Psychopaths at Time of Entry, 68 Yale L. J. 931 (1959), even though the Public Health Service itself has admitted that the term is "vague and indefinite." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-7 (1952). The term "necessitates a personal estimate of community mores," *ibid.* at 943 n. 46; but so does the term "moral turpitude," held not unconstitutionally vague in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). Moreover, the term has been given some concreteness by judicial definition. See *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 411 (2d Cir. 1956); *United States ex rel. Leon* v. *Murff*, 250 F. 2d 436, 439 (2d Cir. 1937). However, the courts have said that those afflicted with "psychopathic personality" are "individuals who show a life-long . . . tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with the authorities." *Flores-Rodriguez, supra*, at 411 (discussing the earlier statutory term "constitutional psychopathic inferiority," but suggesting that it was largely interchangeable with "psychopathic personality"); see *Leon, supra*, at 439 (citing a Public Health Service regulation apparently no longer in effect providing that "there shall be certified as cases of constitutional psychopathic inferiority all psychopathic characters such as . . . persons

who because of eccentric behavior, defective judgment or abnormal impulses are in repeated conflict with social customs and constitutional authorities"); see also Note, 68 [fol. 51] Yale L. J. 931, 940 (1959) ("identifying characteristic" of "psychopathic personality" "is a long-standing pattern of culturally unacceptable behavior"). In the present case, there was no evidence to show that petitioner's sexual deviation was such as to put him in repeated conflict with the authorities. His discussion of his homosexual activities before and after his entry into this country indicates that they were consensual acts between adults, almost always in private places. Contrast *Flores-Rodriguez, supra* (blatant exhibitionist solicitation in public places). In short, neither the term "psychopathic personality" nor its interpretations by the courts prior to petitioner's entry gave petitioner "sufficiently definite warning . . . when measured by common understanding and practices," *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-32 (1951), that his conduct could serve as a basis for exclusion or deportation.

Had the petitioner known that sexual deviation[9] at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior so that he could not be considered a deviate at the time of entry. He was young, intelligent, and responsible. While he had engaged in homosexual acts from the age of 16 to the age of 21, he had also had sexual relations with women three or four times during this period. Dr. Montague Ullman, Director of Psychiatric

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[9] A term which itself raises problems of vagueness. Deviation from what norm? When so much attention is being focused on sexual practices, see, *e.g.*, Kinsey, Pomeroy & Martin, *op. cit. supra*, and Masters & Johnson, Human Sexual Response (1966), and when so many efforts, scientific and otherwise, are being made to discover how the human race can become adjusted to doing what should come naturally, *cf.* Berlin, Annie Get Your Gun 21 (1947), it must be realized that sexual gratification is often achieved in divers ways which may well deviate from popular conceptions of a norm.

Services in the Maimonides Hospital of Brooklyn and Professor of Psychiatry at the State University of New [fol. 52] York, described petitioner's condition as late as March 1965 in the following terms:

> "The patient has sexual interest in girls and has had intercourse with them on a number of occasions . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality."

Another psychiatrist who examined petitioner, Dr. Edward F. Falsey, concluded that petitioner "is not psychotic" and that "the prognosis in therapy is reasonably good."

In brief, petitioner has been ordered deported because of the existence at the time of his entry into this country of a psychological condition which he probably would have been able to correct had he had any reasonable warning that the existence of the condition could serve as a basis for exclusion or, still more drastic, for deportation after entry. He received no warning. I agree with the Ninth Circuit that to uphold a deportation order under these circumstances is repugnant to due process. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U. S. 449 (1963); *Lavoie* v. *Immigration and Naturalization Service*, —— F. 2d —— (9th Cir. 1966).

[fol. 53]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

JUDGMENT—July 8, 1966

A petition for review of an order of the Board of Immigration Appeals.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed.

A. Daniel Fusaro, Clerk.

[fol. 54] Clerk's certificate to foregoing record (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 440—October Term, 1966

CLIVE MICHAEL BOUTILIER, Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—November 7, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

FILED

AUG 12 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

against

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No.

CLIVE MICHAEL BOUTILIER,

Petitioner,

against

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Clive Michael Boutilier petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming a final order for petitioner's deportation.

Opinion Below

The opinion of the Court of Appeals (R. V. II, 32a, Appendix A, *infra*), has not yet been reported.

Jurisdiction

The judgment of the court below (R. V. II, 54a, Appendix B, *infra*) is dated and was entered on July 8, 1966. The jurisdiction of this Court is conferred by 28 U. S. C. Sec. 1254(1).

Questions Presented

The judgment below affirmed an order of the Board of Immigration Appeals ordering the deportation of petitioner under Sec. 241(a)(1) of the Immigration and Nationality Act of 1952 as an excludable alien under Sec. 212(a)(4) on the alleged charge that at time of entry he was "afflicted with a psychopathic personality", to wit—homosexuality. The questions presented are:

1. Whether the application of Sec. 212(a)(4) as here applied to petitioner deprived him of his constitutional guarantee of due process of law in that the statute was void for vagueness.

2. Whether Sec. 212(a)(4) is being unlawfully used here as a guise to effect petitioner's deportation for post-entry conduct that is not an authorized statutory ground therefor.

3. Whether in this deportation proceeding respondent may establish its case against petitioner by a lesser standard of medical proof than is statutorily required in an exclusion proceeding on the same charge.

4. Whether it was error to hold that the statutory term "afflicted with a psychopathic personality" are words of legal art, disassociated from medical nomenclature, that automatically includes any practice of homosexuality.

Statutes Involved

The relevant provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163; Title 8, U. S. Code), provide in part:

"Sec. 212(a)(4) [8 U. S. Code § 1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * *

(4) Aliens afflicted with psychopathic personality, . . .

Sec. 234 [8 U. S. Code § 1224]:

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. * * * Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical Officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) * * * (4) or (5) of Section 212 (a) * * *. Any alien certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) may appeal to a board of medical officers of the United States Public Health Service, * * * and any such alien may introduce before such board one expert medical witness at his own cost and expense.

Sec. 241(a)(1) [8 U. S. Code § 1251(a)(1)]:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;".

Statement of the Case

This case presents a situation in which Sec. 212(a)(4) of the Immigration and Nationality Act of 1952, excluding "aliens afflicted with psychopathic personality" from admission to the United States, is being applied to petitioner some 10 years after he was lawfully admitted, to have him deported under Sec. 241 (a)(1) of that act on the ground that he was excludable at the time of entry because he was a homosexual.

The statute does not define the term "psychopathic personality"; the terms "homosexual" and "sexual deviate" are not mentioned at all. However, admittedly, it has been the practice of the respondent for a number of years to automatically equate all homosexual acts as manifestations of a person "afflicted with psychopathic personality". In pursuance of this practice, this petitioner has been ordered deported and the order has been upheld by the court below.

The circumstances of this case are as follows: Petitioner, a Canadian national, now 32 years old, was admitted to this country for permanent residence in June 1955, at which time he was 21 years of age. He has since lived and worked here steadily and at all times has been self-supporting. Most of his family resides here including his mother and stepfather with whom he resides. He has never been convicted of any crime in this country or in Canada. In October 1959, he was accused of sodomy, which charge was reduced to simple assault and ultimately dismissed for failure of the complainant to prosecute. Petitioner informed a naturalization examiner of this incident in the course of being examined on an application to file a petition for citizenship in September 1963. This information was relayed to the immigration service and in January 1964 petitioner, who was then unrepresented by counsel, was interrogated by an immigration inspector about his sexual experiences before his entry and during the 8 years of his

residence here. He frankly told of having engaged in homosexual acts about four times a year from age 16 until 21 during which time he had also engaged in intermittent heterosexual acts. He was also questioned at length about his post-entry homosexual experiences, and he told of having had such relations three or four times a year during the years of his residence here (R. V. I, 11a-13a).

These questions and answers were submitted to the U. S. Health Service and upon this record of homosexual experiences before entry and post-entry, and no other evidence of any kind, and no examination of petitioner, doctors of the service certified on January 17, 1964, that at the time of his entry in 1955, some nine years earlier, he was a psychopathic personality, to wit, sexual deviate (R. V. I, 15a). Upon this same statement and the certificate of the U. S. Health Service, petitioner was found to have been afflicted with "psychopathic personality" at the time of his entry in 1955 and was ordered deported (R. V. II, 27a).

No evidence was offered by the respondent of any medical, physical or psychiatric examination of the petitioner The only medical evidence bearing on his condition was submitted by the petitioner. It consists of two clinical reports of two practising psychiatrists who examined him at different times, in which each states it to be his opinion that petitioner is not a psychopathic personality (R. V. I, 16a-19a).

The court below (Judge Moore dissenting), while conceding that petitioner could not have been excluded under Sec. 212(a)(4) without evidence that he was afflicted with a psychopathic personality, including a medical and psychiatric examination as set forth in Sec. 234 of the act, holds he may nevertheless be deported now as having been a psychopathic personality back in 1955 without such examination then or now (R. V. II, 37a-39a), App. A, *infra*, 17-19).

It has been the contention of the respondent, adopted by the court below, that while the term "psychopathic per-

sonality" has a medical connotation, it is used in the statute as a term of art under which homosexuality is automatically included. There is no indication by either the respondent or the court what is meant by a homosexual; whether it includes one who engages in both homosexual and heterosexual acts as the petitioner did, prior to entry; whether it applies to someone who has engaged in it once in his life, once a year, four times a year, or constantly; whether it means one who is compulsively drawn to such practices or includes one who is an experimenter or socially induced to such practices. Nor is there any indication whether the finding on which the deportation order is predicated rests on the record of homosexual acts prior to entry only or is based essentially on the post-entry record, thus making such post entry conduct the real basis for deportation, although the statute does not make such conduct a ground for deportation.

Petitioner's statements of post entry homosexual practices over a period of eight years were part of the record before the U. S. Health Service and the Special Inquiry Officer who made the initial determination of deportability; it is inconceivable that the finding of "sexual deviate" was not predicated upon such admission. By relating this conduct to the exclusion statute, petitioner has been constitutionally injured, in that Sec. 212(a)(4) is so vague in meaning that he was not apprised that it referred to homosexual practices he might engage in after entry and which could have been avoided had the language of the statute read as respondent now contends it means. This was held to be the case by the 9th Circuit in the case of *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (1962) and *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27 (1966) where similar situations existed as in the instant cases, and the orders of deportation were held to be invalid. The court below (except for the dissenting judge), however, has refused to accept the reasoning or follow the precedent of those cases.

Reasons for Allowing the Writ

1. The decision of the Court of Appeals herein is in direct conflict with the decisions of the 9th Circuit in *Fleuti* v. *Rosenberg, supra,* and in *Lavoie* v. *Immigration & Naturalization Service, supra,* both of which involve the same matter and issues as in the instant case.

2. This Court has heretofore granted certiorari on the government's application in the *Fleuti* case, *supra* (371 U. S. 859) "in order to consider the constitutionality of Sec. 212(a)(4) as applied to respondent" (374 U. S. 449, 451 (1963)), one of the basic questions raised on this application. However, it did not decide the question at that time, remanding the case for other reasons not raised by the parties.

3. As in the *Fleuti* case, petitioner here urges that Sec. 212(a)(4) of the Immigration and Nationality Act of 1952 has been unconstitutionally construed and applied to him by the court below, thus raising an important question of federal law which has not been, but should be settled by the court.

4. In arriving at its decision herein on the basis of the evidentiary record, the court below enunciated the novel and extraordinary doctrine that petitioner can now be deported, 10 years after his entry, on the ground that he should have been excluded at that time, although the present record lacks evidence including a medical examination which the statute requires to support an exclusion order.

Discussion

As set forth above, the evidentiary record upon which the order of deportation herein rests consists of an oral interrogation of the petitioner in 1964 by an immigration inspector and a certification by the U. S. Health Service

based solely on that interrogation that in 1955 when he entered this country he was a psychopathic personality—sexual deviate. Concededly, there was no medical examination of petitioner by respondent at any time—not at the time of his entry and not in the course of the proceeding to deport him. Yet the court sustains the deportation though it acknowledges he could not have been excluded on this record since there is absent from it the medical examination and other safeguards provided in Sec. 234 of the Act. The court says:

> "Section 241, as we have noted, authorizes the deportation of any alien who could have been excluded upon entering the United States." (R. V. II, 39a, App. A. 19.)

What is glossed over or ignored by the court is that the record does not contain the evidence that would have been required to find him *excludable* at the time of entry in 1955. Indeed, were he entering the United States today, he could not be excluded on that record. The point is that under Sec. 241(a)(1) an alien can be deported only on evidence that would have made him excludable at his time of entry. Since petitioner could not have been excluded without the statutory mental and physical examinations required by Sec. 234, there is no proof in the record that he is an excludable alien.

The dilemma of respondent and the court below stems from their interpretation and application of Sec. 212(a)(4), which makes excludable from this country "aliens afflicted with psychopathic personality". Despite this medical language, they assert that in the context of the statute it is a legal word of art meaning sexual deviates. The court says:

> "It was employed as a term of art to be interpreted by what Congress intended as a guide, and not to be left to the vagaries and conflicting theories of psychiatry for determination." (R. V. II, 39a, App. 19.)

But Congress gave no guide; there is no definition of sexual deviate or homosexual in the statute. Who is a homosexual? If, as Dr. Kinsey estimated in his Sexual Behavior in the Human Male, at least 37% of the American male population have had homosexual experiences, are they all people who would be excludable were they aliens seeking entry here? In the posture of the statute as thus interpreted, it could apply to persons engaging in both heterosexual and homosexual experiences and alike to those who are compulsively motivated and those who seek experiences or thrills. This classification of "psychopathic personality" was one of several medically excludable groups enumerated by Congress in the same section and it is not understandable unless it relates to a medical condition of some kind. Actually, it must have been so understood by the respondent since it solicited a medical opinion from the U. S. Health Service. Yet it insists that the statute involves no medical connotation. Indeed, in its brief to the court below, respondent states:

> "In deportation proceedings the Public Health Service exercises no such function. In fact it is not required that the Public Health Service be consulted; nor is it required that a Public Health certification be obtained." (p. 17)

Respondent and the court are thus forced into the ambivalent position of denying that a medical opinion is required to find that petitioner was a psychopathic personality at the time of entry and at the same time insisting that the pro forma certification by the U. S. Health Service is a medical opinion. It is submitted that a proper interpretation of the statute limits it to sexual deviates who are suffering from a mental disease or disorder and such a finding could only be made after proper medical examination.

The finding of deportability was based on petitioner's admission of homosexual practices during the eight years

he resided here since his entry. In the light of relatively meagre pre-entry experiences in his adolescent years up to the age of 21, the post-entry activities must have been decisive in arriving at that finding. There is no suggestion that petitioner was made aware at time of his entry that pre-entry homosexual practices might cause his exclusion. He was certainly not advised that such conduct after his entry could subject him to deportation. There was nothing in the language of Sec. 212 (a)(4) to have given him warning thereof, particularly as it does not appear that any inquiry was made of him at time of entry of sexual practices.

The term "psychopathic personality" in the statute could not and did not forewarn petitioner that it would be interpreted to mean what the court now says it does. He had no warning when he sought admission; he had no warning during the years of residence here. Under these circumstances, as it is being applied to him the statute is unconstitutionally vague and petitioner has been deprived of due process. This was the holding of the 9th Circuit in the *Fleuti* and *Lavoie* cases and the opinion of the minority court in the instant case.

To predicate the deportation order on the evidence of his post-entry conduct is in fact to deport him for that conduct. It is incredible that in 1964, 8 years after entry, he would have been held to have been excludable at that time (1955) on the basis of his prior entry homosexual experiences alone. It is therefore the post-entry conduct which is the basis for deporting him, though the statute does not proscribe such conduct by making it a ground for deportation. This is the reality, however it is dressed up or beclouded. As said by this Court in *Costello* v. *Immigration Service*, 378 U. S. 120, 131 (1963):

> "In the area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities."

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 249—September Term, 1965.

(Argued June 2, 1966 Decided July 8, 1966.)

Docket No. 30274

CLIVE MICHAEL BOUTILIER,

Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

MOORE, SMITH AND KAUFMAN,

Circuit Judges.

Petition for review of an order directing petitioner's deportation as one who upon entry into this country was a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigation and Naturalization Act of 1952, 8 U. S. C. (1964 ed.) § 1182(a)(4).

Dismissed.

BLANCH FREEDMAN, New York, N. Y. (David M. Freedman, on the brief), *for petitioner.*

Opinion of United States Court of Appeals for the Second Circuit

FRANCIS J. LYONS, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James G. Greilsheimer, Special Assistant United States Attorney, on the brief), *for respondent.*

KAUFMAN, *Circuit Judge*:

Although a relatively young segment of contemporary society prides itself on its readiness to cast off conventional and tested disciplines and to experiment with nonconformance and the unorthodox merely to act out its contempt for traditional values, certain areas of conduct continue to be as controversial in modern and *beau monde* circles as they were in bygone and more staid areas. Homosexual behavior, despite Sigmund Freud[1] and other noted authors,[2] remains such a fervently debated issue that too often emotions on both sides obscure reason. But, the craft of judging requires a personal detachment—as far as it is humanly possible—so that issues which are apt to overwhelm the emotions may be approached in the dispassionate manner fitting for a judicial determination. See Learned Hand, "Fifty Years of Federal Judicial Service," published in Handbook for Judges (1961). Our function in this case, therefore, is not to approve or disapprove of the conduct we are examining; nor is it necessary for us to determine the mores of the community.

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[1] "Homosexuality is no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." Freud, "Letter to an American Mother," published in 107 Am. Jour. Psych., 786-87 (1951).

[2] Kinsey, Sexual Behavior in the Human Male, 623 (1948).

Rather, our duty is simply to interpret a statute and to make the traditional determination as to its application.

I.

Clive Michael Boutilier petitions for review of a final order of the Board of Immigation Appeals directing his deportation to Canada as one who upon entry into this country was a homosexual and, thus, was afflicted with a "psychopathic personality" within the meaning of section 212(a)(4) of the Immigration and Naturalization Act of 1952 (Act), 8 U. S. C. (1964 ed.) § 1182(a)(4).[3] For the reasons set forth below, we uphold the order of the Board and dismiss the petition for review.

The basic facts, which were not seriously disputed, lend themselves to simple statement. Boutilier, a native and citizen of Canada, was admitted into the United States for permanent residence on June 22, 1955 at the age of 21. Since that time, with the exception of short trips outside the country, he has continuously resided here and has been gainfully employed as a building maintenance man, most recently by a large company in Manhattan. Boutilier's mother and stepfather also live in New York and three of his five brothers and sisters reside in the United States.

In September 1963, as part of Boutilier's application to file a petition for citizenship, he submitted an affidavit to a naturalization examiner forthrightly admitting that he had been arrested in October 1959 on a charge of sodomy,

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[3] Section 212(a) provides in pertinent part:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect; . . .

in violation of New York Penal Law, § 690. Boutilier noted that he had been discharged on his own recognizance and that the charge was reduced to simple assault and ultimately dismissed when the complaining party failed to appear in court. Boutilier freely acknowledged that the circumstances leading to the arrest involved acts of anal sodomy and fellatio with a minor—a 17-year-old male.

This affidavit was forwarded to the Immigation Service and, in January 1964, an Immigration Officer informed Boutilier that the government desired additional information. Submitting another sworn statement, Boutilier revealed the full history of his sexual deviate behavior. He stated that his first homosexual experience occurred in Canada when he was approximately 14 years of age; the act was involuntary and Boutilier played a passive role. However, from the time he was 16 until he came to the United States 5 years later, Boutilier voluntarily engaged in homosexual activity on an average of 3 or 4 times a year.[4] These experiences all involved fellatio and Boutilier was generally the active participant. After Boutilier entered this country in 1955, his homosexual conduct continued with approximately the same frequency. Indeed, Boutilier shared an apartment with a male with whom he had sexual relations and, as the result of Boutilier's admitted homosexual condition and a Selective Service psychiatric examination, he was classified 4-F by the Selective Service System.

Immigration officials dispatched this second and more complete statement to the United States Public Health Service for its expert views as to whether there were grounds for concluding that Boutilier was excludable from the United States when he entered in 1955. After review-

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[4] Boutilier acknowledged that, occasionally, he also engaged in heterosexual conduct.

ing this document, the Public Health Service issued a certificate stating that, on the basis of the information furnished, it was of the opinion that Boutilier "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence on June 22nd, 1955."[5]

Armed with this certificate and the supporting documents, the government commenced deportation proceedings. At hearings held before a Special Inquiry Officer, Boutilier declined an opportunity for an *in personam* examination by Public Health Service doctors. He did, however, introduce two letters[6] from privately retained psychiatrists which were received in evidence without objection by the

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[5] The certificate was signed by Paul G. Smith, M.D., Senior Surgeon, United States Public Health Service, Chief of Psychiatry and by Maria Sarrigiannis, M.D., Medical Director, United States Public Health Service.

[6] One letter was signed by Edward F. Falsey, M.D. and dated March 2, 1964. It stated:

> On psychiatric examination of Mr. Boutelier [*sic*], there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

The second letter was in the form of a "Clinical Abstract" on the stationery of Montague Ullman, M.D., under date of March 30, 1965. In pertinent part, it stated:

> [Boutilier's] sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interest as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

government.[7] In addition, it was substantially agreed between the parties that this additional material would not cause the Public Health Service to change its certification and, accordingly, no purpose would be served by calling a Public Health Service doctor to testify. Based on the evidence and stipulations, the Special Inquiry Officer concluded that Boutilier had been a homosexual at the time of entering the United States and, thus, was excludable as one afflicted with a "psychopathic personality." On this basis, the Special Inquiry Officer ordered Boutilier deported, noting that the phrase "psychopathic personality" as used in section 212(a)(4) of the Act is not a medical formulation but is a legal term of art evincing a Congressional purpose to exclude from this country any alien who is shown to be a homosexual. After an unsuccessful appeal to the Board of Immigration Appeals, Boutilier asks us to vacate the order of deportation.

II.

Boutilier now urges that an actual medical examination by the Public Health Service was an indispensable prerequisite to its opinion that he was afflicted with a "psychopathic personality."[8] In support of this position, Boutilier relies on section 234 of the Act, 8 U. S. C. § 1224, which directs that certification of the physical and mental condition of "arriving aliens . . . shall be made by medical

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[7] The government noted, however, that it considered the phrase "psychopathic personality" appearing in Dr. Ullman's letter to be used in a medical frame of reference and not as a legal term of art.

[8] It could be urged that Boutilier is estopped from making this contention in view of his rejection of the government's offer to have the Public Health Service conduct an *in personam* examination. But, in view of the serious consequences of a deportation order and the government's failure to press this point, we shall make our determination on the merits.

officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical or mental defect or disease observed . . ." See also 42 C. F. R. § 34.1. Boutilier urges that if an exclusion proceeding is to be valid, adherence to these procedures is required. See *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949).

While this contention possesses surface plausibility, it is spurious and has a fatal flaw: it glosses over the basic and fundamental distinction between exclusion and deportation proceedings. Boutilier's ouster was directed because he was "excludable" in 1955 as one afflicted with a "psychopathic personality." But, this is not to say that the process by which his expulsion was ordered was an exclusion proceeding. On the contrary, section 241(a) of the Act, 8 U. S. C. (1964 ed.) § 1251(a), expressly provides that "any alien in the United States . . . shall . . . *be deported who* . . . at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . ." (emphasis added).

Thus, section 234 and the cases and regulations which Boutilier cites are not in point; they describe requirements which are applicable solely to exclusion proceedings and have nothing to do with deportation procedures—our main concern here and the path to be followed is laid down in section 242(b) of the Act, 8 U. S. C. § 1252(b). We note, in this connection, that Boutilier does not claim that the government failed to comply with the rules and regulations which guide the conduct of deportation proceedings.

The confusion between "exclusion" and "deportation" is also at the root of Boutilier's argument that he is being expelled on a non-statutory ground. Boutilier asserts that while affliction with a "psychopathic personality" may furnish a basis for exclusion, this term does not authorize

deportation. We find no merit in this suggestion. Section 241, as we have noted, authorizes the deportation of any alien who could have been excluded upon entering the United States. While this form of "delayed exclusion" has not been altogether free from criticism, see *Note, Limitations on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry,* 68 Yale L. Jour. 931, 935 (1959), without the provision, an imprimatur would be placed on deception of immigration officials at time of entry. *Developments in the Law: Immigration and Nationality,* 66 Harv. L. Rev. 643, 682 (1953). The function served by deportation in cases where the petitioner was excludable is to furnish a backstop or check designed to intercept those whom Congress believed should not have been admitted into the United States in the first instance.

III.

Despite Boutilier's arguments to the contrary, we believe the term "psychopathic personality" as employed in section 212(a)(4) reflects a Congressional purpose to prevent alien homosexuals from obtaining admission into this country. It was employed as a term of art to be interpreted by what Congress intended as a guide, and not to be left to the vagaries and honest but conflicting theories of psychiatry for determination.[9] The legislative history of the Act of 1952 and of the various bills and resolutions which gave rise to it leaves no room for doubt that Congress intended

[9] It is also interesting that some psychiatrists have recently used the term "sociopath" in lieu of "psychopathic personality." See Hinsie & Campbell, Psychiatric Dictionary, 600, 682 (Third Ed. 1960). And, psychiatrists, at times, have changed their minds, as to whether "psychopathic personality" constitutes a "mental disease or defect" for purposes of determining criminal responsibility. See *Blocker* v. *United States,* 288 F. 2d 853, 860 (D. C. Cir. 1961), Burger, J. (concurring).

to exclude homosexuals and would have expressly so provided if the Public Health Service had not advised that the term "psychopathic personality" alone was sufficient to accomplish this result.

Prior to 1952, the Immigration laws employed the language "persons of constitutional psychopathic inferiority," as those subject to exclusion, section 3 of the Act of February 5, 1917, 39 Stat. 875; but, the 1952 Act changed this terminology to the more modern concept of "psychopathic personality." Initially, the Senate Committee on the Judiciary reported that "the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mental defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., 345 (1950).

As a result, a series of proposed bills were drafted, each of which provided for the exclusion of "aliens afflicted with psychopathic personality" and "aliens who are homosexuals or sex perverts." See, e.g., S. 3455, 81st Cong., 2d Sess., § 212(a) (1950); S. 716, 82d Cong., 1st Sess., § 212(a) (1951). In S. 2550, 82d Cong., 2d Sess., § 212(a) (1952), however, express reference to "aliens who are homosexuals or sex perverts" was eliminated for the following reason:

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any*

way as modifying the intent to exclude all aliens who are sexual deviates. S. Rep. No. 1137, 82d Cong., 2d Sess., 9 (1952) (emphasis added).

While S. 2550 was not enacted, the report accompanying H. R. 5678, the bill which ultimately became the Act of 1952, contained similar reference to observations by the Public Health Service. Commenting on the medical aspects of a predecessor bill (H. R. 2379, 82d Cong., 1st Sess., § 212(a) (1951), which had placed "homosexuals or sex perverts" in a separate excludable category, the Public Health Service recommended that this separate rubric be eliminated and that the phrase "psychopathic personality" —the terminology ultimately enacted—be employed. The Service noted that this phraseology would satisfy the Congressional objective of excluding homosexuals and perverts because ordinarily sexual deviation was a manifestation of a psychopathic personality. In reporting out the bill, which was to become the 1952 Act, the House Judiciary Committee indicated that, with an exception not here relevant, it had accepted the Public Health Service's recommendations. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-48 (1952).

Thus, on the basis of this brief survey of the legislative history of section 212(a)(4), it seems fairly clear that Congress utilized the phrase "psychopathic personality" not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States. "[W]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here." *Quiroz* v. *Neelly*, 291 F. 2d 906, 907 (5th Cir. 1961). See also, *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S. D. N. Y. 1959), *affirmed without opinion sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (2d Cir.), *cert. denied*, 364 U. S.

824 (1960); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412-413, n. 2 (2d Cir. 1954) (concurring opinion).[10]

Our review of the legislative history of section 212(a)(4) also disposses of Boutilier's contention that the Public Health Service exceeded its statutory authority by classifying all homosexuals as persons "afflicted with psychopathic personality." Paragraph 6-b of the United States Public Health Service Manual provides that in the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." While some psychiatrists believe that all homosexuals cannot properly be termed psychopaths,[11] Paragraph 6-b also notes that the phrase "psychopthic personality" is a "legal" term. Moreover, as we have observed, since Congress intended to exclude homosexual aliens, the Public Health Service cannot be faulted for implementing this statutory pur-

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[10] Indeed, because of contrary interpretations in the Ninth Circuit, discussed in section IV of this opinion, *infra*, Congress recently amended section 212(a)(4) to provide expressly what its reports have said over and over again—that "sexual deviates" are excludable. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919. The committee reports of both houses state:

> To resolve any doubt the Committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill. H. R. Rep. No. 745, 89th Cong., 1st Sess., 16 (1965). S. Rep. No. 748, 89th Cong., 1st Sess., 19 (1965).

[11] See e.g. n. 6, *supra*.

Dr. Paul G. Smith who signed the certification of Boutilier's condition as a "psychopathic personality" testified that modern psychiatric theory does not espouse the proposition that a sexual deviate is *ipso facto* a constitutional psychopathic inferior or a psychopathic personality. *Matter of Anne-Lise Coppo*, a deportation proceeding, file No. A-6845593—New York (December 8, 1965).

But, as we have noted, in the context of this case, psychiatric definitions are not determinative of the legal purport of the term "psychopathic personality."

pose by utilizing an automatic rule which functions in such a way as to accomplish this objective.[12]

IV.

Placing principal reliance on *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U. S. 449 (1963), Boutilier vigorously maintains that section 212(a)(4) is void for vagueness and that the order directing his deportation deprived him of due process. The Court of Appeals for the Ninth Circuit has found this argument persuasive and, citing *Fleuti*, has recently adhered to this view in a *per curiam* opinion, *Lavoie* v. *Immigration and Naturalization Service*, — F. 2d — (9th Cir. 1966). At the heart of Boutilier's argument is the notion that the term "psychopathic personality" lacked sufficient precision to convey adequate warning to him that post-entry homosexual conduct was proscribed. Upon examining the rationale of the void-for-vagueness doctrine, however, we conclude that it is inapplicable to section 212(a)(4).

Although it is a legal fiction that everyone is presumed to know the law, that precept does not always come to the aid of the prosecutor nor work against the transgressor. A corollary of this doctrine is that legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). While the void-for-

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[12] We also reject Boutilier's contention that there was insufficient evidence of his "psychopathic personality" at the time of his entry into the United States to justify deportation. Boutilier's sworn statement describing in detail his homosexual activities in Canada provided more than ample proof of his excludable condition.

vagueness doctrine is principally employed in the interpretation and application of criminal statutes, it is also relevant in considering legislation imposing civil sanctions. *Jordan* v. *De George*, 341 U. S. 223 (1951);[13] *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925); *Miller* v. *Strahl*, 239 U. S. 426 (1915); see generally, *Note, Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

We do not quarrel with Boutilier's contention that the term "psychopathic personality" is not a model of clarity. There is no denial that Congress sought assurance that the phrase would encompass homosexuals and sex perverts.[14] And, while the Public Health Service counseled that "psychopathic personality" was sufficiently broad to fulfill the Congessional objective of excluding sexual deviates, the Service candidly advised that, in terms of medical reference, the definition was "vague and indefinite," and that "no more appropriate expression can be suggested at this time." H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46-47 (1952).

But all this does not establish that section 212(a)(4) is defective under the void-for-vagueness doctrine. The provision was never designed to regulate *conduct*; its function was to exclude aliens possessing certain *characteristics*. Had Boutilier, after entering the United States in 1955, commenced leading a life of impeccable morality, section 212(a)(4) would still have been applicable to authorize his deportation. And, we emphasize that the section does not focus on Boutilier's post-entry behavior but on his con-

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[13] In *De George*, the Supreme Court determined that the phrase "moral turpitude" appearing in the predecessor of section 241, 8 U. S. C. § 1251(a) was not unconstitutionally vague. Significantly, section 241 which authorizes deportation of aliens who are convicted of at least two crimes involving "moral turpitude" attempts, unlike section 212(a)(4), to regulate post-entry conduct.

[14] See discussion of the legislative history of section 212(a)(4), *supra*.

dition at the time of entry into the United States. It is beyond contest that he was a homosexual long before leaving Canada. It is not without significance also that in *Fleuti*, the Court noted "the examining officer chose to rely heavily upon post-entry behavior." It may well be that the Court found it necessary, therefore, to determine whether the term "psychopathic personality" was sufficiently precise to afford adequate warning to Fleuti. In the case before us, however, while the Special Inquiry Officer credited Boutilier's sworn statement which described in detail the full history of his homosexual behavior, there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition. For these reasons, we do not consider *Fleuti* authoritative, and we believe that the order directing Boutilier's deportation did not constitute a denial of due process on the void-for-vagueness doctrine or any other grounds. We find that the clear design of Congress was to exclude homosexuals from entry into the country and this it has done in section 212(a)(4) by the use of the words "psychopathic personality." It is not our function to sit in judgment on Congress' wisdom in enacting the law. "Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired [the law] . . ." [15] L. Hand, "The Contribution of an In-

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[15] The dissent, while possessing *ad hominem* appeal, falls into error by improperly shifting the focus from a legal exegesis to a medical explanation of the term "psychopathic personality." As Judge Moore noted in his dissent in *United States ex rel. Paktorovics v. Murff*, 260 F. 2d 610, 618 (2d Cir. 1958), "emotional reaction should not blind us to the fact that our immigration policy has been, and still should be, declared by Congress, and enforced by such officers of government as are so designated by Congress." Unfortunately, our dissenting colleague has failed to follow his own caveat.

dependent Judiciary to Civilization," published in The Spirit of Liberty (1953).

We have considered Boutilier's other contentions and find them to be without merit.

The petition for review is dismissed.

MOORE, *Circuit Judge* (dissenting):

The majority upholds the deportation of a young man who arrived in this country in 1955, who has worked hard and gainfully ever since, who is respected in his work, and most of whose close relatives—including his mother, his stepfather, and three of his five brothers and sisters—reside in this country. The majority does so on the grounds that at the time the petitioner entered this country at the age of 21, he could have been excluded as one "afflicted

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Although his plea for "clemency" is quite moving, it is illustrative of the case with which one can succumb in a case such as this to the temptation of permitting the emotions to overwhelm reason and enacted law. Congress has made its judgment, for better or worse, respecting the exclusion of homosexuals which we are not at liberty to alter. The dissent's parade of distinguished historical personages allegedly possessing homosexual attributes does not detract one iota from that conclusion. Indeed, under the current version of section 212(a)(4), see n. 10, *supra*, there is little doubt that some of these eminent gentlemen would be excludable.

Thus, while the house of horrors erected by our dissenting brother stimulates the imagination and arouses our sympathy, it is largely irrelevant. Congress studiously avoided turning this into a medical problem and did not authorize immigration officials to conduct a detailed psychiatric examination into the nature, frequency and variety of a particular homosexual's acts; rather, it enacted a clearcut rule of law: it determined that pre-entry homosexual behavior was to be a ground for exclusion. And, neither citations to the Sonnets of Michelangelo and Campanella, to the New York Times, nor even to Annie Get Your Gun will aid us in our statutory interpretation or change this simple fact of life.

with psychopathic personality" under § 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. § 1182(a)(4), since he had had a number of homosexual experiences before coming to this country. The majority manifestly agrees with the Board of Immigration Appeals "that the term 'psychopathic personality' is a term of art and that it includes an alien upon mere proof that he is a homosexual."

Petitioner's homosexual experiences were revealed not in any proceeding at the time of original entry but solely as a voluntary disclosure some 8 years after entry (September 1963) in connection with a petition for naturalization. The admission of an arrest for sodomy in October 1959 (charge reduced and ultimately dismissed) led to a request for further information which petitioner again supplied voluntarily. The most adverse conclusion which can be derived from petitioner's statements is that petitioner engaged in sexual activity on a quite infrequent basis with both men and women during the five-year period before his coming to the United States.

Both the procedure and the statutory interpretation used by the immigration authorities in this deportation proceeding are not only offensive to, but, in my opinion, completely lacking in, due process, for interrelated reasons.

Appellant was adjudged "afflicted with psychopathic personality" without any formal examination by qualified psychiatrists. The majority states that appellant's history was referred to the Public Health Service "for its expert views as to whether there are grounds for concluding that Boutilier was excludable . . ." The word-picture suggests a careful and particularized analysis by distinguished psychiatrists to determine whether appellant was so disturbed as to be "afflicted with psychopathic personality." Nothing could be further from what actually happened. The Public Health Service simply looked at appellant's statement in which he admitted having had homosexual experiences

before he came to this country, and automatically stamped him a "psychopatic personality, sexual deviate," following the directive of the Public Health Service manual that under the category of psychopathic personality "will be classified those applicants who are diagnosed as sexual deviates." This was not the result of process, "due" or otherwise; it was the result of a mere fiat in a Public Health Service manual which labels as "psychopathic personalities" many who upon proper phychiatric examination might be found to possess no psychopatic symptoms.[1]

This lack of careful case-by-case determination cannot be upheld simply because this is a proceeding to deport rather than a proceeding to exclude. If anything, greater procedural safeguards are constitutionally required in cases of deportation than in cases of exclusion, because of the greater hardship involved in uprooting an alien from a country once he has developed economic and social ties there and slackened or severed those which bound him to his country of origin. Compare *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950) (alien can be excluded without a hearing) with *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903) (alien sought to be deported is constitutionally entitled to a hearing) and *Kwong Hai Chew* v. *Colding*, 244 U. S. 590 (1953) (resident alien seeking re-entry is constitutionally entitled to a hearing); see also *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950) (administrative hearing in deportation case must conform to the requirements of the Administrative Procedure Act).

The lack of careful—in fact the lack of any—medical examination and analysis was not peculiar to the proceedings against the present petitioner, but results from a long-standing statutory interpretation, promulgated by the immigration authorities and embodied in the Public Health Service manual, that mere proof of homosexuality con-

[1] See footnote 11 of the majority opinion.

stitutes a demonstration of the existence of "psychopathic personality." Under such circumstances, it would have been futile for the petitioner to request an examination by a board of Public Health Service doctors.

I cannot impute to Congress an intention that the term "psychopathic personality" in the 1952 amendments of the Immigration and Nationality Act be construed to cover anyone who had ever had a homosexual experience. Professor Kinsey estimated that "at least 37 per cent" of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age. Kinsey, Pomeroy & Martin, Sexual Behavior in the Human Male 623 (1948). Earlier estimates had ranged from one per cent to 100 per cent. *Id.* at 616-622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain.[2] To label a group so large "excludable aliens" would be tantamount to saying that Sappho,[3] Leonardo da Vinci,[4] Michelangelo,[5] Andre Gide,[6] and perhaps even Shakespeare,[7] were they to come to life again, would be deemed unfit to visit our shores. Indeed, so broad a defini-

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[2] N. Y. Times, July 6, 1966, § 1, p. 7, col. 1.

[3] Whom Plato called the Tenth Muse. Loeb Classical Library, Greek Anthology, Vol. 3, p. 281. See Patrick, Sappho and the Island of Lesbos (1912).

[4] See The Notebooks of Leonardo da Vinci 189, 223 (P. Taylor ed. 1960).

[5] *Cf.* Sonnets of Michelangelo and Campanella (J. A. Symonds trans. 1878).

[6] *Cf.* Gide, L'Immoraliste (1902).

[7] See, *e.g.*, Sonnets 20, 33, 108.

tion might well comprise more than a few members of legislative bodies.[8]

At most, the legislative history of the 1952 amendments indicates that Congress intended to exclude those who were "sexual deviates" at the time of entry into this country, see S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952). The term "sexual deviate" suggests someone with a long-lasting and perhaps compulsive orientation towards homosexual or otherwise "abnormal" behavior. The Public Health Service report on which the House Judiciary Committee relied in its discussion of the bill as finally enacted, see H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-8 (1952), indicates a narrower definition of the term "psychopathic personality." That report states that "psychopatic personalities" are "disorders of the personality . . . characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior," and that those "psychopatic personalities" who are "ill primarily in terms of society and the prevailing culture . . . frequently [evidently not always] include those . . . suffering from sexual deviation." U. S. Code Cong. & Ad. News 1700-1701, 82d Cong., 2d Sess. (1952). This legislative history suggests that Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a "disorder of the personality" as to constitute "psychopathic personality."

Even assuming that Congress intended the term "psychopathic personality" to cover anyone who was a

---

[8] *Cf.* remarks of Sir Cyril Osborne, opposing reintroduction into the House of Commons of the current British bill on homosexuality: "If this House were representative of the country, then there would be at least 30 homos in this House." Upon being asked to name them, however, Sir Cyril stated that in his 21 years in Parliament he had never encountered "one case of a homo in this House." N. Y. Times, July 6, 1966, § 1, p. 7, col. 1.

sexual deviate at the time of entry, petitioner had no way of knowing that "phychopathic personality" meant what Congress intended it to mean. "Psychopatic personality" may not be so vague as to be meaningless in all applications, as some have suggested, see Note, Limitations on Congressional Power to Deport Resident Aliens as Psychopaths at Time of Entry, 68 Yale L. J. 931 (1959), even though the Public Health Service itself has admitted that the term is "vague and indefinite." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 46-7 (1952). The term "necessitates a personal estimate of community mores," *ibid.* at 943 n. 46; but so does the term "moral turpitude," held not unconstitutionally vague in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). Moreover, the term has been given some concreteness by judicial definition. See *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 411 (2d Cir. 1956); *United States ex rel. Leon* v. *Murff*, 250 F. 2d 436, 439 (2d Cir. 1937). However, the courts have said that those afflicted with "psychopathic personality" are "individuals who show a life-long . . . tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with the authorities." *Flores-Rodriguez, supra*, at 411 (discussing the earlier statutory term "constitutional psychopathic inferiority," but suggesting that it was largely interchangeable with "psychopathic personality"); see *Leon, supra*, at 439 (citing a Public Health Service regulation apparently no longer in effect providing that "there shall be certified as cases of constitutional psychopathic inferiority all psychopathic characters such as . . . persons who because of eccentric behavior, defective judgment or abnormal impulses are in repeated conflict with social customs and constitutional authorities"); see also Note, 68 Yale L. J. 931, 940 (1959) ("identifying characteristic" of "psychopathic personality" "is a long-standing pattern of culturally unacceptable behavior"). In the present case,

there was no evidence to show that petitioner's sexual deviation was such as to put him in repeated conflict with the authorities. His discussion of his homosexual activities before and after his entry into this country indicates that they were consensual acts between adults, almost always in private places. Contrast *Flores-Rodriguez, supra* (blatant exhibitionist solicitation in public places). In short, neither the term "psychopathic personality" nor its interpretations by the courts prior to petitioner's entry gave petitioner "sufficiently definite warning . . . when measured by common understanding and practices," *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-32 (1951), that his conduct could serve as a basis for exclusion or deportation.

Had the petitioner known that sexual deviation [9] at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior so that he could not be considered a deviate at the time of entry. He was young, intelligent, and responsible. While he had engaged in homosexual acts from the age of 16 to the age of 21, he had also had sexual relations with women three or four times during this period. Dr. Montague Ullman, Director of Psychiatric Services in the Maimonides Hospital of Brooklyn and Professor of Psychiatry at the State University of New

[9] A term which itself raises problems of vagueness. Deviation from what norm? When so much attention is being focused on sexual practices, see, *e.g.*, Kinsey, Pomeroy & Martin, *op. cit. supra*, and Masters & Johnson, Human Sexual Response (1966), and when so many efforts, scientific and otherwise, are being made to discover how the human race can become adjusted to doing what should come naturally, *cf.* Berlin, Annie Get Your Gun 21 (1947), it must be realized that sexual gratification is often achieved in divers ways which may well deviate from popular conceptions of a norm.

York, described petitioner's condition as late as March 1965 in the following terms:

> "The patient has sexual interest in girls and has had intercourse with them on a number of occasions . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality."

Another psychiatrist who examined petitioner, Dr. Edward F. Falsey, concluded that petitioner "is not psychotic" and that "the prognosis in therapy is reasonably good."

In brief, petitioner has been ordered deported because of the existence at the time of his entry into this country of a psychological condition which he probably would have been able to correct had he had any reasonable warning that the existence of the condition could serve as a basis for exclusion or, still more drastic, for deportation after entry. He received no warning. I agree with the Ninth Circuit that to uphold a deportation order under these circumstances is repugnant to due process. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *remanded on other grounds*, 374 U. S. 449 (1963); *Lavoie* v. *Immigration and Naturalization Service*, —— F. 2d —— (9th Cir. 1966).

APPENDIX B

Order Dismissing Petition

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United day of July, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

CLIVE MICHAEL BOUTILIER,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

A petition for review of an order of the Board of Immigration Appeals.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

* * * * *

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A, pp. 12–33) are not yet reported.

* * * * *

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 34) was entered on July 8, 1966. The petition for a writ of certiorari was filed on August 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 212(a)(4) of the Immigration and Nationality Act of 1952, which excludes from ad-

mission into the United States aliens "afflicted with psychopathic personality," is void for vagueness as applied to homosexuals.

2. Whether the evidence was insufficient because there was no medical examination of petitioner by the United States Public Health Service.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens * * * shall be excluded from admission into the United States:
>
> * * * * *
>
> (4) Aliens afflicted with psychopathic personality * * *;
>
> * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> Sec. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * * *

STATEMENT

Petitioner, a 33-year-old native and citizen of Canada, was admitted to the United States for permanent residence on June 22, 1950 (R. II, 13a–14a).[1] In

[1] The record filed with the Clerk of this Court consists of petitioner's appendix (R. I) and respondent's appendix (R. II) below.

September 1963, he submitted an affidavit to a naturalization examiner as a part of an application to file a petition for citizenship. He stated therein that he had been arrested in New York in October 1959 on a charge of sodomy.* Upon the request of the Immigration Service for further information, petitioner in January 1964 submitted a sworn statement to an immigration officer to the effect that he had engaged in voluntary homosexual relations on an average of three or four times a year since the age of sixteen, a period that embraced six years prior to his entry into the United States as well as eight years after entry (R. II, 16a–19a). Petitioner also stated that in December 1957 he had acknowledged being a homosexual on a selective service form and, after examination by a psychiatrist, had been classified 4–F by reason of that condition (R. II, 19a–20a). From 1959 to 1964, petitioner shared an apartment with another man with whom he had occasional sexual relations (R. II, 18a–19a).

Petitioner's sworn statement was forwarded to the United States Public Health Service for an opinion as to whether, on the basis of the statement, there were grounds for concluding that petitioner was excludable from the United States at the time of his entry in 1955. On the information supplied, the Public Health Service certified its opinion that petitioner was afflicted with psychopathic personality

*The charge was eventually dismissed because the complainant failed to appear in court. Petitioner, however, freely stated to the immigration officer that the acts leading to arrest involved anal sodomy and fellatio with a male minor (R. II, 15a).

(sexual deviate) at the time of his admission in June 1955 (R. I, 15a).*

On the basis of the Public Health Service certification and supporting documents, deportation proceedings were instituted on January 28, 1965. Petitioner was alleged to be deportable under Section 241(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)) in that he was excludable, by the law existing at the time of his entry (Section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4)), as an alien afflicted with psychopathic personality. At hearings before a Special Inquiry Officer, petitioner declined personal examination by Public Health Service doctors (R. I, 6a; R. II, 7a), electing instead to introduce letters from two private psychiatrists. These letters stated in effect that, although petitioner had engaged in homosexual activities, he was not psychotic or psychopathic (R. I, 16a–19a). It was stipulated that the letter opinions of the two private psychiatrists need not be submitted to the Public Health Service for reconsideration of its findings since, if a Public Health doctor appeared to testify regarding the material, he would testify that petitioner had been a sexual deviate at the time of his entry into the United States, and was properly certified as a psychopathic personality under the pertinent regulations (R. I, 6a–

* Paragraph 6–b of the United States Public Health Service Manual provides that those applicants who are diagnosed as sexual deviates shall be classified in the statutory category "afflicted with psychopathic personality."

7a). Petitioner's counsel agreed that there was no serious contest as to whether or not petitioner was a sexual deviate, but only as to whether he was afflicted with psychopathic personality (R. I, 7a).

The Special Inquiry Officer found that petitioner had been a sexual deviate at his entry and hence excludable as an alien afflicted with psychopathic personality, noting that "[w]hatever the phrase 'psychopathic personality' might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts." (R. II, 26a). The Board of Immigration Appeals agreed (R. I, 2a–3a) and the Court of Appeals for the Second Circuit (one judge dissenting) dismissed the petition for review (Pet. App. A; R. II, 32a–53a).

DISCUSSION

1. The holding of the court below in this case—that the statutory ban on aliens afflicted with psychopathic personality is not unconstitutionally vague as applied to homosexuals—is in direct conflict with the holding of the United States Court of Appeals for the Ninth Circuit in *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27, in which the government has filed a petition for a writ of certiorari (No. 513, this Term). As we explain in that petition, the conflict is one which should be settled by this Court. We accordingly do not oppose the granting of certiorari with respect to the constitutional question in the present case.

2. We believe, however, that review of the remaining issues is not warranted. Petitioner's principal

contention is that a medical examination similar to that required for exclusion proceedings is necessary to support a deportation order (Pet. 2, 7-9). Petitioner's argument is based on the assumption that the Immigration Act makes the same procedures applicable to both exclusion and deportation proceedings, but that is not so. For exclusion purposes, the Act (Section 234, 8 U.S.C. 1224) provides for the medical examination of aliens suspected of being excludable as, among other things, afflicted with psychopathic personality.[4] The same provision authorizes an appeal from an adverse medical certification to a board of medical officers. The final certification then goes to an examining immigration officer, who must detain the alien for further inquiry before a Special Inquiry Officer unless it appears "clearly and beyond a doubt" that the alien is entitled to enter. 8 U.S.C. 1225(b). The decision of the

[3] Petitioner's contentions that he was unlawfully deported for post-entry conduct (Pet. 2, 9-10) and that the term "homosexual" is too vague to give meaning to the statute (Pet. 2, 9) are plainly without merit. It is uncontested that petitioner was a homosexual long before his entry into the United States and that the public health certificate was addressed to the time of his entry. While the Special Inquiry Officer credited petitioner's statement concerning his post-entry homosexual activities, it is clear that the deportation order rested on the finding that the disqualifying condition existed at the time of entry. As to the second contention, whatever the force of the void-for-vagueness doctrine as applied to the statutory term "psychopathic personality," the term "homosexual" used by the Service is not vague as applied to this case. It clearly defines the sexually deviant conduct which the evidence showed petitioner engaged in over a number of years prior to his entry and which placed him in an excludable class of aliens.

[4] The procedures for the medical examination are set forth in the Public Health Service's regulations, 42 C.F.R. Part 34.

Special Inquiry Officer must be based solely upon the medical certification, without an inquiry into the underlying factual basis for the determination. 8 U.S.C. 1226(d); see *United States ex rel. Johnston v. Shaughnessy*, 336 U.S. 506, 509.

The deportation procedure under Section 242(b) of the Act (8 U.S.C. 1252(b)) is radically different. It substantially parallels a trial before a judicial tribunal. It is an adversary proceeding in which the government has the burden of proof. The Special Inquiry Officer's decision must be based solely on the evidence produced at the hearing, and he has full authority to try *de novo* all factual questions upon which deportation depends. That was done here. The government proved petitioner to be a sexual deviate who had engaged in homosexual behavior over a long period of time. Petitioner's own psychiatric evidence supported this finding, and his counsel readily conceded that there was no serious contest concerning petitioner's classification as a sexual deviate (R. I, 7a). Moreover, the government expressly offered petitioner an opportunity to take the Public Health Service medical examination he now asserts was required—which he refused (R. I, 6a; R. II, 7a). He should not now be heard to complain that the record is deficient in this regard.

CONCLUSION

For the foregoing reasons, we suggest that the petition for a writ of certiorari be granted (together with the government's petition in *Lavoie*), limited,

however, to the constitutional question whether the statutory term "psychopathic personality" is void for vagueness as applied to homosexuals.

Respectfully submitted.

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SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

SUPREME COURT, U. S.

To be argued by Blanch Freedman.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
DEC 30 1966
JOHN F. DAVIS, CLERK

NO. 440

CLIVE MICHAEL BOUTILIER,

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v.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

BRIEF FOR PETITIONER

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To be argued by Blanch Freedman

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NO. 440

CLIVE MICHAEL BOUTILIER,

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THE IMMIGRATION AND NATURALIZATION SERVICE,

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion below (R. 29) has not yet been reported.

JURISDICTION

The judgment below is dated and was entered on July 8, 1966 (R. 50). The petition for certiorari was filed on August 12, 1966 and was granted on November 7, 1966 (R. 51). The Court has jurisdiction under Title 28, U.S.C. § 1254(1)

QUESTIONS PRESENTED

The judgment below affirmed an order of the Board of Immigration Appeals ordering the deportation of petitioner under Sec. 241(a)(1) of the Immigration and Nationality Act of 1952 as an excludable alien under Sec. 212(a)(4) on the alleged charge that at time of entry he was "afflicted with a psychopathic personality", to-wit—homosexuality. The questions presented are:

1. Whether Sec. 212(a)(4) as here applied to petitioner deprived him of his constitutional guarantee of due process of law.

2. Whether Sec. 212(a)(4) is being unlawfully used here as a means to effect petitioner's deportation for a ground that is not authorized by statute.

3. Whether in this deportation proceeding respondent may establish its case against petitioner by a lesser standard of proof than is statutorily required in an exclusion proceeding on the same charge.

4. Whether it was error to hold that the statutory term "afflicted with a psychopathic personality" are words of legal art, disassociated from medical nomenclature, that automatically includes any practice of homosexuality.

STATUTES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163; Title 8 U.S. Code), provide in part:

"Sec. 212(a)(4) [8 U.S. Code § 1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(4) Aliens afflicted with psychopathic personality epilepsy, or a mental defect.

Sec. 234 [U.S. Code § 1224]:

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. * * * Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical Officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) * * * (4) or (5) of Section 212 (a) * * *. Any alien certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) may appeal to a board of medical officers of the United States Public Health Service, * * * and any such alien may introduce before such board one expert medical witness at his own cost and expense.

Sec. 241(a)(1) [8 U.S. Code § 1251(a)(1)]

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

STATEMENT OF THE CASE

Petitioner, who has been a resident of this country, for some ten years, has been ordered deported. The order is based on a finding that he was excludable at the time of his entry as a person "afflicted with psychopathic personality", to wit-a sexual deviate. This finding in turn rests solely on testimony of the petitioner that he had engaged in homosexual practices before and after entry (R. 20).

The term "psychopathic personality" is not defined in the statute; the terms "homosexual" and "sexual deviate" are not even mentioned. Nevertheless, admittedly, it has been the practice of the respondent over a number of years to equate all homosexual behavior with a "psychopathic personality". (R. 28) In pursuance of this practice, petitioner was ordered deported (R. 27) and the petition for review of such order was dismissed by the court below.

The facts of the case are as follows: Petitioner is a Canadian national, now thirty-three years old. He was admitted to this country for permanent residence in June 1955 at which time he was 21 years of age. He has lived here ever since, working steadily and at all times self supporting. With the exception of one sister and brother, his family of six siblings lives in the United States, as do his mother and stepfather, with whom he resides in New York City. (R. 21) He has never been convicted of crime. However, in 1959 he was arrested at home on a charge of sodomy under the New York Penal Law which was subsequently reduced to simple assault and ultimately dismissed for failure of the complainant to prosecute. (R. 17-18)

Upon an application for citizenship in 1963 petitioner candidly informed the naturalization examiner of the aforesaid arrest. This information was relayed to the Immigration Service whereupon petitioner was directed to appear at the office of the Service on January 13, 1964

Unrepresented by counsel, and not advised of his right to be so represented[1] (R. 1) he was interrogated by an immigration inspector about his sexual experiences both before his entry and during the eight years subsequent thereto. He again frankly admitted having had homosexual experiences about three or four times a year from age sixteen until twenty-one, during which time he also engaged in heterosexual practices. He was also questioned at length about post-entry homosexual behavior and he told of having had such relations, also, approximately three to four times a year in the post-entry period. (R. 7)

The Immigration Service submitted the statement containing petitioner's answers to these questions to the Public Health Service. Solely upon this statement of homosexual experiences before and principally after entry, and without examination of petitioner or medical evidence of any kind, doctors of the Public Health Service certified within four days of the making of the statement, that at the time of his entry in June 1955 — some nine years earlier — petitioner was a "psychopathic personality", to wit: a sexual deviate. (R. 11)

A year later, January 1965, respondent initiated deportation proceedings against petitioner.[2] In these proceedings, the only medical evidence relating to his con-

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[1] The opening question of the investigator (R. 1) discloses that petitioner was not advised of his right to counsel or that he need not answer any or all of the questions put to him. The drastic penalty and consequences that attend deportation impel the application of the same essentials to a fair trial as obtain in a criminal prosecution. *Bridges v. Nixon*, 326 U.S. 135, 154 *Barber v. Gonzales*, 347 U.S. 637, 642. The failure to advise petitioner of his right to counsel is a denial of due process of law. *Massiah v. U.S.* 377 U.S. 201; *Escobedo v. Illinois*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436.

[2] Order to Show Cause was dated January 28, 1965; it was served upon petitioner February 4, 1965 and hearings were held March 8, 1965 and July 26, 1965. (R. 16)

dition was submitted by the petitioner. It consists of two clinical reports of two practicing psychiatrists who examined him at different times, a year apart, and in which each states his opinion to be that petitioner is not a "psychopathic personality". (R. 12-16)

No evidence of any kind was submitted by the respondent as to the physical, mental or psychiatric condition of petitioner at the time of his entry in 1955 or at the time of the hearing in 1965. Instead, it was stipulated (1) that petitioner had not been examined by the Public Health Service; (2) that the reports of Dr. Falsey and Dr. Ullman, the psychiatrists who had examined petitioner, had not been considered by its doctors in making their certification; and (3) that if a Public Health Service doctor were called to testify, he would state that regardless of what an examination by him of petitioner would have disclosed, and notwithstanding the opinion of the two psychiatrists, the said doctor, "would be required to certify that he (petitioner) was a 'psychopathic personality' within the meaning of the Public Health Regulations" (R. 19) and that this "has in fact been their testimony in all the similar cases where they have appeared for cross examination." (R. 25)

The sole evidence presented by the respondent was the aforesaid statement of questions and answers and the certification of the Public Health Service based thereon.

This is the record upon which petitioner has been found deportable by the Special Inquiry Officer. The appeal therefrom to the Board of Immigration Appeals was dismissed on January 12, 1966, holding:

> We * * * think it proper to sustain the charge here upon proof of the existence of only a homosexual condition. (R. 28)

The court below (Judge Moore dissenting) dismissed the petition for review of the order of deportation. In doing so, the court rested on the following propositions, each of which petitioner urges is erroneous:

(1) That while petitioner could not have been excluded from this country on entry without the medical, physical and psychiatric examination statutorily mandated, he can now be deported on the ground that he was excludable, without such examinations having been had then or now; (R. 35)

(2) That the term "psychiatric personality" employed in the exclusion statute is a term of art to be interpreted to mean homosexuals, and that Congress so intended; (R. 38)

(3) That the exclusion statute read into the deportation statute as the basis for the order of deportation was not unconstitutionally vague because it did not relate to petitioner's post-entry conduct but to his characteristics; (R. 41)

(4) That while the record on which deportation was ordered deals mainly with petitioner's post-entry sexual practices, there is not the slightest indication that the deportation order was based on anything other than his pre-entry condition. (R. 41)

SUMMARY OF ARGUMENT

The order of deportation herein should be vacated. It is basically the result of a profound error of fact which has resulted in a fundamental error of law in the interpretation and administration of the exclusion and deportation statutes involved herein.

The factual error lies in the assumption that homosexual behavior is per se evidence of a "psychopathic personality". The legal error flowing from this is the construction that the statutes in question mandate the deportation of an alien who is found to have engaged in homosexual practices. This error resulted in denying petitioner due process of law. The denial takes the following forms:

(1) While the statute reads and superficially is administered as relating to persons who, at the time of their entry to this country are suffering from some condition that can be medically diagnosed as "psychopathic person-

ality", it is in fact construed and applied as relating to persons who have engaged in homosexual practices, without regard to whether they are psychically induced or related. This dichotomy between the statutory text and its administration renders it constitutionally vague and uncertain and has deprived petitioner of due process.

(2) If the statute is to be interpreted as claimed by respondent, then by reason of the vagueness set forth above, it has failed to give adequate reasonable notice to petitioner that that is its meaning and thus deprived him of the opportunity to refrain from homosexual practices after his entry, which according to the statements of his doctors, he was well able to do. Thus, combined with the use of evidence of his post-entry conduct, the vagueness of the statute in this respect has denied him due process.

(3) To the extent that respondent has justified its construction and administration of the statute on the theory that "psychopathic personality" is a reasonable assumption that may be made from the fact of homosexual practices, such assumption is unfounded in fact and medical experience and therefore cannot be sustained.

(4) The claim that such construction and interpretation is carrying out the expressed intention of Congress is predicated solely on a single reference in a Senate Report accompanying a bill which never became law, and is negated by an objective examination of the legislative history of the several laws that have been enacted dealing with the same subject matter.

(5) As a result of its approach to the statute, respondent has failed to establish that petitioner is deportable. The alleged basis for deportation is that he was excludable. Admittedly, he could not have been legally excluded without having been examined by the Public Health Service with a right of appeal therefrom. Yet, he is now ordered deported as excludable without any such examinations and with the only medical evidence in the record negating that he is a "psychopathic personality".

(6) Stripped to its essentials, it becomes evident that petitioner is being deported because he was involved in homosexual experiences after his entry to this country. There is no statutory basis for deportation on such ground and this is, in fact, something illegally and arbitrarily created by the respondent.

ARGUMENT

Preliminary Statement

This is a proceeding in deportation. Constitutional guarantees of the Fifth Amendment attach thereto. *Sung v. McGrath*, 339 U.S. 33, 50. The fact that deportability is predicated upon an exclusion statute does not diminish or alter petitioner's right to due process of law. Petitioner, as a permanent, legally-resident alien, is entitled not to forfeit his residence and the opportunity to work and live in the United States upon an administrative ruling and procedure that violates due process. *Chew v. Colding*, 344 U.S. 590, 596-8; *Brownell v. Shung*, 352 U.S. 180, ftn. 182; *Jordan v. DeGeorge*, 341 U.S. 223, 231.

Section 212(a)(4) bars from admission to the United States aliens "afflicted with psychopathic personality". The respondent construes this phrase to include all persons who engage in homosexual acts regardless of whether such homosexual conduct is associated with psychopathology and without proof that the alien is a psychopathic personality (R. 28). The respondent justifies such interpretation and enforcement of the section as effectuating Congressional intent. (R. 28-29)

Petitioner contends that the statute so construed and as applied to him deprived him of due process of law.

If, as respondent contends, Congress intended by this statute to include "homosexuals", it is nonetheless vague in language giving rise to constitutional infringement in its operation and application.

The source of the evil lies in an apparent belief that there is some kind of recognizable human being that is a "homosexual" — like one might recognize a "red-head". It is clear from the statement of Dr. C. R. Tripp, appended to this brief (supra pp. 43-51) that this is a mistaken notion. By and large homosexuality is a kind of behavior, evidently very wide-spread, and not the manifestation of a particular kind of person. It is because of this basic misconception of what homosexuality is, that vagueness and consequent constitutional violation has resulted. Respondent claims, and the court below agreed, that the statute aims at excluding *persons of certain characteristics*. The fact remains that in this and similar cases, it has administered the act as relating to *persons who have engaged in certain behavior*.

The court below in its opinion offers a classic example of this ambivalence. In countering petitioner's claim that the statute is void for vagueness, it says:

> But all this does not establish that section 212(a)(4) is defective under the void-for-vagueness doctrine. The provision was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics*. (R. 41)

Yet, in note 15 to the opinion, apparently written some time later, it says:

> Congress studiously avoided turning this into a medical problem * * * rather, it enacted a clear-cut rule of law: It determined that pre-entry *homosexual behavior* was to be a ground for exclusion (italics ours) (R. 42)

In short, there is the automatic equivalence of behavior with characteristics.

The distinction here sought to be made can be more readily recognized if the instant situation is analogized to "kleptomania". That there are persons who steal because they are afflicted with some psychopathic disturbance is generally recognized.

> * * * "Kleptomania" is the scientific name for the disease of stealing. Persons who are victims of it will steal in spite of all restraints. (*State v. Reidell*, Del. 14 A. 550.)
>
> It is a species of mania, consisting of an irresistible impulse to steal. (*Lowe v. State*, 70 S.W. 206; 44 Tex. Cr. R. 224.)

Had Congress legislated to exclude persons called "kleptomaniacs" we would have a situation analogous to that here presented were that law administered as the existing law is with respect to persons who have engaged in homosexual conduct. For then, respondent would exclude as "kleptomaniacs" all persons who pilfer, shop-lift or steal without regard to whether such acts are "irresistible" or "in spite of all restraint". Obviously, not everyone who steals is a kleptomaniac — a person suffering from some mental disorder. Equally, not everyone who engages in a homosexual act is suffering from a psychopathic disorder.

Because of the basis misconception here described, the language of the statute is vague and uncertain; it has been improperly construed and applied by respondent to petitioner and resulted in the denial to him of due process.[3]

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[3] " * * * we do not here question the power of Congress to define deportable conduct. We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligible definition of deportable conduct." (Dissenting opinion of Mr. Justice Jackson, *Jordan v. DeGeorge*, 341 U.S. 223, 245)

I

The Relevant Statutes as Here Construed and Applied Denied to Petitioner Constitutional Due Process of Law.

Constitutional due process is embedded in the fundamental idea of fairness and fairplay essential to the very concept of justice. *Lisemba v. California*, 314 U.S. 219, 236. Basic to it is the requirement that legislation be definite and certain so that men of common intelligence will know what conduct is being commanded or forbidden without having to speculate or guess as to its meaning and as to its implications. *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458; *Cramp v. Board of Public Instructions*, 368 U.S. 278, 287; *United States v. Harriss*, 347 U.S. 612. It requires that an inference or presumption created by the legislature be rationally connected in common experience to the ultimate fact to be established. *Tot v. United States*, 319 U.S. 463, 468.

(a) *The Statute Is Vague and Is Not Administered in Accordance With Its Language.*

As stated, the exclusion statute makes no mention of homosexual practices as a ground therefor. It does not even mention sexual deviation in general. Yet, respondent claims that such conduct is what is meant by "afflicted with psychopathic personality", the only term used in the statute, but which is undefined and whose meaning is vague.[4]

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[4] *Noyes, Modern Clinical Psychiatry*, 3d ed. 1941, 410: "Psychopathic personality * * * is considered by many to be a meaningless designation * * * not yet is there any common agreement * * * as to classification or * * * etiology."

Guttmacher, Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time, in *Current Problems in Psychiatric Diagnosis*, (Hoch & Zubin, ed. 1953) 139, 154: "At present, the diagnosis of a psychopathic personality is practically meaningless."

See also appended statement of Dr. Tripp. (infra, pp. 47, 48)

However, it is urged that the term is vague only if it is considered as a medical term. Respondent insists, and the court below has accepted, that while the language of the statute is medical in form, it was "employed as a term of art" (R. 36) and really means sex deviate. But explanation is also lacking of what makes the term "sex deviate" specific, if that is what the statute means.

The fact, nevertheless, is that the term *is a medical one* and the statute has meaning and can be administered only if it is given a medical meaning. Vague as it is, it can only be defined medically.[5] That Congress regarded it as a medical term is apparent for it appears in the statute in a subdivision which includes persons afflicted with other maladies:

> aliens afflicted with psychopathic personality, epilepsy, or mental defect. (§ 212(a)(4))

The Senate report[6] on which reliance for the "term of art" theory is placed speaks of the Public Health Service as having advised the use of that term (R. 37). Admittedly, an entering alien cannot be excluded on this ground without a medical examination and certificate of his excludability by the Public Health Service (Sec. 234, 8 U.S.C. 1224). (Supra, p. 3; R. 34-35) In this case and in other deportation cases involving the same issue, respondent invariably sought and received certification that the alien was a sex deviate from the Public Health Service. (R. 11) In this very case, while the court below accepted the "term of art" theory (R. 32), it endeavored to cover it up by stating:

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[5] *Webster's Third New International Dictionary* (1961) p. 1833 defines the word as follows:

Psychopathic - relating to or characterized by psychopathy;
Psychopathy - mental disorder.

Funk and Wagnalls College Standard Dictionary (1941) p. 918: psychopathy - mental derangement, especially as apart from disease of the brain.

[6] S. Rept. No. 1137, 82d Cong., 2d Session

> Immigration officials dispatched this second and more complete statement [of petitioner] to the United States Public Health Service for its *expert* views * * * . (R. 32) (italics ours)

(What expert view could it render other than a medical opinion)

Thus by actual language and actual practice, the statute is treated as dealing with persons who have a medical problem. And the fact is that the statute can only be administered intelligently and meaningfully if made applicable to persons who are *medically* found to be afflicted with "psychopathic personality." Yet, in spite of this, respondent insists the statute is intended and must be construed to apply to all persons who have engaged in homosexual conduct, irrespective of any medical infirmity.

It is the considered opinion of many psychiatrists that homosexual behavior is not necessarily an indication of psychotic disturbance and that no inference of impairment may reasonably be made from such behavior. Indeed, this opinion is shared by Dr. Smith, chief psychiatrist for the Public Health Service, the very physician who certified petitioner without examination to be a "psychopathic personality".[7]

Respondent, in administering this statute rides two horses. One consists of treating the statute as if it applied to persons afflicted with a psychotic condition; when that is challenged for lack of proof, it mounts the other horse, saying, in the words of the Court below, Congress did not intend it "to be left to the vagaries of honest but conflicting theories of psychiatry for determination", (R. 36) but that it applies to everyone who had homosexual experiences.

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[7] R. 39, footnote 11

(b) *The Statute Is Vague in Failing To Adequately Apprise Its Meaning To Be as Contended by Respondent, if That Is Its Meaning.*

If the term "psychopathic personality" in the statute is merely a euphemism for "homosexual" as respondent claims, then the problem of vagueness arises. The problem thus created is two-fold: *first,* the exclusion statute failed to apprise petitioner at the time of entry of what respondent now claims made him then excludable; *second,* it failed to apprise him that his post-entry sexual behavior could be made the basis for his expulsion from this country. There was nothing on the face of the statute to have advised petitioner when he sought to enter that it meant not what it says, but what respondent now says it means. Moreover, the visa application which he was required to execute and which lists the classes of persons who are statutorily excludable does not include sexual deviates, or persons who have had homosexual experiences; it does not even refer to psychopathic personalities.[8] Granted petitioner is presumed to know that the statute made excludable persons afflicted with psychopathic personality, he cannot be charged with knowing what is not a fact — that indulgence in homosexual conduct means one is so afflicted. Eminent psychiatrists beginning with Sigmund Freud have made that clear.[9]

Exhibit 4 (R. 11) shows that the classification of petitioner as an alien afflicted with psychopathic personality at the time of entry in 1955 was made by the Public

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[8] The pertinent questions of the visa application (Nos. 37 and 38) signed by petitioner are appended hereto. (Pp. 37-39)

[9] "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." ("Letter to an American Mother", by Sigmund Freud, American Journal of Psychiatry, Vol. 107, April 1951; reprinted in The Problem of Homosexuality in Modern Society, edited by Hendrik M. Ruitenbeck, E. P. Dutton, 1963.)

Health Service some ten years after the fact and is based solely upon petitioner's admissions to the respondent of homosexual practices, largely during that ten year period. Theoretically, the post-entry conduct is not the ground for his deportation but it cannot be gainsaid that it is being used as persuasive evidence to establish the condition at entry upon which deportability now is predicated.

The constitutional significance of this use of the post-entry record of petitioner's homosexual practices is that they may well have been avoided had he been informed by the statute that they could be used to establish a pre-entry condition of psychopathic personality. For there is nothing in the record to establish or even suggest that those experiences were compulsive in character and not merely a matter of choice. Dr. Montague Ullman, Director of Psychiatric Services in the Maimonides Hospital of Brooklyn and Professor of Psychiatry at the State University of New York examined petitioner. In his clinical report he stated:

> The patient has sexual interest in girls and has had intercourse with them on a number of occasions * * * His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. (R. 15, 16)

In *Fleuti v. Rosenberg*, 306 F.2d 652 remanded on other grounds, 374 U.S. 449, the Ninth Circuit, unlike the court below, held the statute to be unconstitutionally vague, in a case very similar to the present one. (Also in *Lavoie v. Immigration and Naturalization Service*, 300 F.2d 27; petition for certiorari pending No. 513) Dis-

cussing the use of post-entry conduct in that case [10] the court said:

> While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry condition, the prejudice would be substantial. The examiner might have found the evidence of pre-entry homosexual practices sufficient to support a finding of "psychopathic personality". But whether such a finding would have been entered in 1959, based on pre-entry conduct prior to 1952, or whether on such facts a charge would even have been brought, is a matter of speculation. The fact that the examining officer chose to rely heavily upon post-entry behavior is some indication that a charge might not have been filed, or a finding entered, on pre-entry behavior alone. (p. 656)

Where conduct is proscribed, or as here utilized as a basis for depriving one of his right to remain in the United States, substantive due process demands that the statute involved give him adequate notice, without requiring him to read legislative histories or to probe the mind of the legislators who enacted it. *United States v. Harriss*, 347 U.S. 612, 617. In the present case "neither the term 'psychopathic personality' nor its interpretations by the Courts prior to petitioner's entry gave petitioner 'sufficiently definite warning * * * when measured by common understanding and practices,' *Jordan v. DeGeorge*, 341 U.S. 223, 231-232, that his conduct could serve as a basis for exclusion or deportation". [11]

In *Fleuti*, the court, considering this aspect of the case, concluded:

> The conclusion is inescapable that the statutory term "psychopathic personality" when measured by common understanding and practices, does not

[10] This case also involved the subject alien's homosexual practice. The history of Fleuti's homosexuality covered 22 years, 1936-1959, with monthly indulgences and two convictions relating thereto. (Id. p. 655)

[11] Dissenting opinion below of Judge Moore. (R. 48)

> convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness, as applied in this case. Enforcement of the order of deportation would therefore deprive Fleuti of the due process of law. (p. 658)

(c) *The Statute and/or Its Administration Rests on an Untenable Assumption.*

The contention of the respondent and its administration of the statute is based on the assumption that anyone who has engaged in homosexual acts is a "psychopathic personality", within the meaning of the statute. This contention is maintained in a context, where the statute makes no such automatic association, either in its text or by definition elsewhere in the law; where neither statute nor regulation places limitation or guide lines on the kind of homosexual behavior thus characterized, so that it may include persons who also engage in heterosexual acts, and persons whose homosexual practices vary from rare or infrequent to those who engage in it continuously and flagrantly.

This court has upheld the validity of statutes where guilt was predicated on an assumption, e.g. *United States v. Gainey*, 380 W.S. 63. But in all such cases, the test has been that the assumption be a rational one within common experience. The leading case of *Tot v. United States, supra*, where the presumption was found repugnant to due process, sets forth the rule:

> * * * the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress * * * to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt [deportability] is predicated.

> * * * Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts. (pp. 647-648)

When the assumption is not legitimate, rational or reasonable, the statute making it will not be upheld, as it was not at the last term of the Court in *United States v. Romano*, 382 U.S. 136.

Here the statute does not make the assumption. It is made by the respondent in administering it, claiming that Congress intended it should. The assumption, however, is ill-founded, not rational and not within common experience. The extent of homosexual practices and its ubiquitousness alone is sufficient to negate it. For example, it was pointed out by Prof. Alfred C. Kinsey:

> In these terms (of physical contact to the point of orgasm) the data in the present study indicate that at least 37 percent of the male population has some homosexual experience between the beginning of adolescence and old age . . . This is more than one male in three of the persons that one may meet as he passes along a city street.[12]

Another authority, Prof. Robert Lindner, observed:

> One obvious reason for the neglect of so many persons is that inverts do not comprise a well-defined minority. This is to say that the homosexual is found on all levels of society, among all ethnic groups, in every station, occupation and calling.[13]

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[12] *Sexual Behavior in the Human Male*, W. B. Saunders Co. 1948; Ch. 21, Homosexual Outlet, p. 623.

[13] *Homosexuality and the Contemporary Scene*, paper on The Problem of Homosexuality in Modern Society, ed. by Hendrik M. Ruitenbeck, p. 61; E. P. Dutton, 1963.

We have heretofore adverted to the fact that in the opinion of psychiatrists, including Dr. Smith of the Public Health Service, there is no necessary relation between homosexual behavior and "psychopathic personality". (supra) Dr. Smith in another case, testified:

> Dr. Snow (a witness for the alien) testified that a sexual deviate is not ipso facto either a constitutional psychopathic inferior or a psychopathic personality. He stated that in order to arrive at a medical finding that such a person is either a constitutional psychopathic inferior or a psychopathic personality there must be more than sexual deviation. . . Dr. Smith, who is a Senior Surgeon of the United States Public Health Service and a chief in Psychiatry at the United States Public Health Service Hospital at Staten Island, New York, testified that he is in complete accord with the medical opinion of Dr. Snow. (*In Matter of Anne-Lise Coppo*, file No. A-c845593, opinion of Special Inquiry Officer, Feb. 28, 1965, page 5)

When further asked to reconcile his certification of the subject alien as a "psychopathic personality" (in circumstances similar to the instant case) Dr. Smith stated "that as a qualified physician he was in full accord with the opinion of Dr. Snow and with modern psychiatric theory, but that, as an employee of the United States Public Health Service, he was bound by any instruction of the organization addressed to its employees". (*Id.* p. 6)

The administration of the statute on respondent's theory that "psychopathic personality" can be assumed from evidence of homosexual practice is not warranted by the facts of life or common experience. Such application to petitioner denied him due process of law.

(d) *Congressional Intent Cannot Be Used To Defeat Due Process of Law.*

The Court below (Judge Moore dissenting) never came to grips with the underlying constitutional question of due process: the vagueness and indefiniteness of Section 212(a)(4) leading to its improper administration; the fail-

ure of the statute to give notice of its meaning as contended by respondent; the unreasonable creation of a presumption of the ultimate fact of psychopathic personality. These were treated peremptorily because, essentially, the Court below believed:

> * * * that the clear design of Congress was to exclude homosexuals from entry into the United States and this has been done in Section 212(a)(4) by the use of the words "psychopathic personality" (R. 42).

This is not a permissible answer when the validity of a statute is constitutionally challenged. Due process of law may not be avoided by recourse to legislative intent. The statute must be judged on its face. A statute which is in conflict with the constitution is invalid regardless of the intentions of the legislature enacting it, and regardless of the fact that it may be based on strong considerations of public policy. *United States v. Harriss* (supra, 617), *United States v. Spector*, 343 U.S. 169, 172.

Section 212(a)(4) as it affected and was applied to petitioner deprived him of due process of law in violation of the Fifth Amendment to the Constitution.

II

The Order of Deportation Is Invalid; It Rests on an Erroneous Construction of the Term "Psychopathic Personality" in Section 212(a)(4).

Respondent's contention that the term "afflicted with psychopathic personality" is a term of art intended by Congress to include all homosexual behavior is based wholly upon a report of the Senate Judiciary Committee[14] containing the following language:

> The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently

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[14] Senate Report #1137 (82d Cong., 2d Sess. 1952) p. 9

> broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.

The report accompanied Senate Bill S. 2550 (82d Cong 2d Sess.); it was not adopted by the Senate. Four of the thirteen Committee members had dissented and had filed a minority report.[15] Hence, Senate Report #1137 upon which respondent relies to transform "psychopathic personality" from a medical term into a term of legal art, is not the expression of Congressional intent bottoming Section 212(a)(4). The Senate bill and the report were both replaced by House Bill H.R. 5678 which was enacted and House Report #1365. Thus, the latter is the official legislative report for the Immigration and Nationality Act of 1952,[16] and that report does not reflect the House Committee's understanding of the term "psychopathic personality" to embrace all homosexual practices.

The legislative background and history of the section discloses no Congressional intent to give the term special meaning as words of *art* or that it was being used in a sense other than what its common meaning was in the medical profession.

The history begins with the Act of February 5, 1917[17] when Congress expanded the classes of excludable aliens to include "persons of constitutional psychopathic inferiority". The report that accompanied the 1917 bill explained:

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[15] The minority report stated "We respectfully disagree with the majority report of the Committee of the Judiciary . . . S. 2550 is a bill which . . . in fact incorporates within its 302 pages hundreds of highly controversial provisions which require much more careful study and consideration by the members of the Committee than was possible under the circumstances."

[16] U.S. Code, Cong. & Adm. News, 82d Cong., 2d Sess. (1952) p. 1653.

[17] 39 Stat. 875

> The real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations. * * * *This change was made after consultation with persons of knowledge and experience.* * * * (emphasis added) [18]

From the above it is clear that at the very outset Congress knowingly employed medical terms to describe medical affliction to be excluded. It used a term that was then understood in the medical profession to denote a constitutional pathological condition.

As medical knowledge broadened — particularly in the field of psychiatry — the physicians of the Public Health Service encountered increasing difficulty in classifying as excludable psychopathic conditions in terms of "constitutional psychopathic inferiority". [19]

In 1947 Congress passed Senate Resolution #137 [20] "to make an investigation of the immigration system". Pursuant to the resolution "an intensive investigation and study of our entire immigration and naturalization system was made over a course of two and one-half years," culminating in April 1950 in Senate Report #1515 and Senate Bill S. 3455.[21]

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[18] Senate Report #1515, 81st Cong., 2d Sess. (1950) p. 338

[19] Dr. G. L. Dunnahoo, Chief, Div. of Foreign Quarantine, USPHS, in INTERPRETER RELEASES, Vol. XXXVIII, No. 35, Aug. 7, 1951, p. 225: "The statutory term 'constitutional psychopathic inferiority' has no exact counterpart in present medical or psychiatric terminology. However, with certain limitations the term 'psychopathic personality', with its various subcategories, would seem to have the same meaning. In the classification of conditions under this category the word 'constitutional' is important. This term implies that the psychopathic inferiority was present at birth".

[20] 80th Cong., 1st Sess. (1947)

[21] Supra, note 18

Chapter IV, Subsection 4 of that Report is entitled: MEDICAL EXCLUSION [of aliens]. It is a discussion of Medical problems under the 1917 law. The report stated

> * * * the chief difficulties in the administration of the exclusion clauses of the 1917 Act pertaining to mentally and physically defective aliens arise in diagnosing "constitutional psychopathic inferiority". (p. 343)

It was recommended that:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. (p. 343)

It is inescapable that the term "psychopathic personality", used for the first time in a Congressional report, was not being employed as a term of *art*. The report was describing *medically* those maladies to be excluded. Regardless of etiology — whether a constitutional inferiority or a psychopathic personality — its manifestation as a psychopathic condition or mental defect made it excludable. The "homosexuals and other sex perverts" referred to are those who are medically ill, that is, *sexuality that is pathologic.*

Senate Report #1515 accompanied Senate Bill S. 3455. Listed among the classes to be excluded were: (1) "aliens afflicted with psychopathic personality", and (2) "aliens who are homosexuals or sex perverted". It may be argued that this separate and specific classification showed an intent to exclude *all* homosexuals. If so, it equally evidenced a Congressional understanding that the term "psychopathic personality" was a medical classi-

fication — not a term of art — and did not include all homosexuals, at most only such of them as were psychopathic. Senate Bill 3455 was not adopted.

The bill was redrafted and in 1951 became S. 716 (82d Cong., 1st Sess.). Its counterpart in the House was H.R. 2379. The House Judiciary Committee submitted H.R. 2379 to the Public Health Service for opinion of its medical proposals for exclusion. The bill provided, *inter alia*, for the exclusion of the following aliens:

> "(1) Aliens who are idiots, imbeciles, *feeble minded*, epileptics or insane; (emphasis added)
>
> (2) * * *
>
> (3) Aliens afflicted with psychopathic personality
>
> * * *
>
> (7) Aliens who are homosexuals or sex perverts."

On May 15, 1951 the Public Health Service replied to the House Judiciary Committee with its "Report ON THE MEDICAL ASPECTS OF H.R. 2379." At the outset it suggested:

> that the language of the bill would be more clear if those items . . . of section 212(a), which are conditions related to the field of mental disorders and subject to medical determination, be grouped together, and that items . . . relating to paupers, etc. be placed in the group not subject to medical determination. Such grouping of the classes of excludable aliens would have a more appropriate relationship. (U.S. Code Cong. & Admin. News (1952) p. 1700)

The Public Health Service approved for exclusion item (3) — "psychopathic personality" as a term more properly describing the ailments to be affected. The report stated:

> . . . The conditions classified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or

> emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in term of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term 'psychopathic personality' should be retained. (*Id.* p. 1700)

With respect to item (7): "homosexuals or sex perverts' the Public Health Service advised:

> * * *Ordinarily, persons suffering from *disturbances* in sexuality are included within the classification of *'psychopathic personality with pathologic sexuality'*. This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism fetishism, transvestism, pedophilia, etc. (Id. p. 1701) (emphasis added).

The Public Health Service made no recommendation to eliminate said item (7). Rather, the suggestion implicit in its discussion is that *homosexuality and sex perversions that were pathologic and symptomatic of severe underlying neurosis or psychosis should be excluded,* and as to such afflictions they were already included in item (3) — "psychopathic personality".

In contrast, the Public Health Service directly recommended the elimination of the term "feeble-mindedness" in item (1) saying:

> Feeble-mindedness is an inclusive generic term represented by subclasses of idiots, imbeciles, morons, and border-line intelligence. * * * There is no point in retaining the inclusive generic term "feeble-minded. * * *" (Id. p. 1700)

Although H.R. 2379 did not pass, in 1952 the House Judiciary Committee introduced a new bill — H.R. 5678 — accompanied by House Report #1365 (supra, 22, ftn. 16), which incorporated the full report of the Public Health

Service of May 1951. The new House bill also took into account the thinking and suggestions of the Public Health Service Report. With deliberate selectivity it elected not to delete the term "feeblemindedness" as recommended by the Public Health Service because "of the existence of an extensive body of judicial administrative decisions pertinent to the meaning of the term 'feebleminded'".[22] On the other hand, it did accept the implied suggestion not to create a category that excluded all homosexuals, as had been proposed in the 1950 bill. It chose to have homosexuals considered within the framework of the term psychopathic personality — a medical term denoting a pathological condition. Clearly, had Congress intended to exclude every sexual deviation, whether or not it was pathologic, it would have rejected the thinking of the Public Health Service in this respect as it did with aliens who were "feebleminded", and it would have retained in the statute the separate and specific listing of "homosexuals or sex perverts".[23]

Judge Moore, in his dissenting opinion observed the wide-spread indulgence in homosexual experiences of the American male population. He noted:

> I cannot impute to Congress an intention that the term "psychopathic personality" in the 1952 Act amendments to the Immigration and Nationality Act be construed to cover anyone who had ever had a homosexual experience. (R. 45) [24]

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[22] House Report 1365, p. 17

[23] After the *Fleuti* decision (supra) Congress amended the immigration law (Act of Oct. 3,1965, § 15(b), 79 Stat. 919). It is significant that Congress again chose not to use language including all homosexuals but rather merely amended Section 212(a)(4) limiting such exclusion to "aliens *afflicted with* psychopathic personality or *sexual deviation*". In any event, the amendment cannot establish in the prior law what Congress subsequently enacted. *Wong Kam Wo v. Dulles*, 236 F.2d 662 (CA-9)

[24] Indeed, it was understood by the Second Circuit to characterize "individuals who show a life-long and constitutional ten-

> * * * Indeed, so broad a definition might well comprise more than a few members of legislative bodies. (R. 46)
>
> * * * The term "sexual deviate" suggests someone with a long lasting and perhaps compulsive orientation towards homosexual or otherwise "abnormal" behavior. The Public Health Service report on which the House Judiciary Committee relied in its discussion of the bill as finally enacted, * * * indicates a narrower definition of the term "psychopathic personality". * * * This legislative history suggests that Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a "disorder of the personality" as to constitute "psychopathic personality" (R. 46).

This court has held repeatedly:

> A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or *by the rule of constitutional adjudication * * * that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts.* (*U.S. v. Witkovich*, 353 U.S. 194, 199) (emphasis added)

The broader and undisclosed meaning of "psychopathic personality" which respondent has imposed upon petitioner generates constitutional doubts that the Court of Appeals for the Ninth Circuit felt impelled to sustain.

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dency not to conform to group custom, and who habitually misbehave so flagrantly that they are continually in trouble with authorities." (*U.S. v. Flores-Rodriguez*, 237 F.2d 405, 411)

III

Respondent Has Failed To Establish That Petitioner Is Deportable.

The basis for this proceeding is that petitioner at the time of entry was excludable by the law existing at such time. Respondent has held that petitioner at that time was a person afflicted with psychopathic personality, to wit — sexual deviation and hence, presently deportable.

To establish that petitioner was excludable ten years ago, the proof must be no less than is required to establish that he would be excludable today if he were entering presently under the same law.

Respondent admits, and the court below accepts, (R. 34) that exclusion would have required a medical examination of the physical and mental condition of petitioner under section 234 of the Immigration and Nationality Act, and a certification by the Public Health Service of any defect based on such examinations. *United States ex rel Johnson v. Shaughnessy*, 336 U.S. 806. It is undisputed that there was no such examination of petitioner. The certificate of the Public Health Service was made solely on a reading of the question and answer statement of petitioner. (R. 11)

The interrogation of petitioner was by an immigration investigator whose inquiries were designed to elicit information as to his eligibility to remain in this country. This was not the kind of interrogation that a trained psychiatrist would conduct to determine the mental or psychiatric condition of the petitioner. Nothing was elicited or inquired into about his working and general living habits, his background and environment, or the variety of matters that would normally be of concern to a psychiatrist in evaluating a patient.

Upon this barren record, the certificate of the doctors of the Public Health Service was made. While they signed their names to the certification as physicians, the truth

of the matter is that in doing so they were not performing a professional act; they were acting as clerks certifying that they reviewed the petitioner's testimony and that since they found in it admissions of having engaged in homosexual acts prior to his entry to the United States this automatically made him a psychopathic personality, sexual deviate.

The court below, while recognizing the absence herein of a true medical certification made on actual medical examination, held that this is prescribed for *exclusions*, but no such requirement obtains for deportation. (R. 35) What the court glosses over is that the proof that petitioner was *excludable* requires at least the same proof that would have been required to *exclude* him. If he could not be excluded on the proof presented here, how can he be found deportable because he is excludable?

An attempt to overcome this is made by the suggestion that petitioner refused to be examined by the Public Health Service. (R. 18) This is no answer. Respondent conceded that such an examination would be futile for the regulations of the Public Health Service required the doctors to certify petitioner to be a psychopathic personality, irrespective of what their medical examination of him disclosed. (supra pp. 6, 20) Furthermore, in a deportation proceeding petitioner did not have to submit to physical examination. If that refusal resulted in respondent not having the required evidence to sustain the charge, its situation would be no different than had petitioner refused to answer the questions put to him and upon which answers this proceeding was predicated. He had been advised that his statement must be voluntary. (R. 1)

The position of the court below leads to the anomalous and incredible situation that a person who has lived here for ten years may be deported on a record on which he could not have been excluded. (Cf. U.S. ex rel Knauff v. Shaughnessy, 338 U.S. 537) Even were that a tenable position, the record does not support the order of depor-

tation. In the first place no credence was given to opinions of the two psychiatrists offered in support of petitioner. (R. 12-16) Assuming a basis for the presumption that "psychopathic personality" could be inferred from homosexual behavior, the statements of the doctors rebutted such presumption as to this petitioner. Yet, they were ignored by the Special Inquiry Officer and by the Board of Immigration Appeals (R. 23-29), in their determination. This is directly contrary to what the Board of Immigration Appeals itself said was required of it in *United States v. Murff*, 250 F.2d 436 (CA-2) where the court quoted from its opinion as follows:

> Since the question arises in deportation, as distinguished from an exclusion proceeding (citing U.S. ex rel Johnson v. Shaughnessy, 336 U.S. 806), the Board is required to evaluate all the evidence of record, including certificate of the Public Health Service and the evidence submitted by respondent, in determining whether the mental charge is sustained. (p. 438)

The evidence of homosexual acts by the petitioner prior to entry was meagre and fragmentary. It covered his adolescent years from sixteen to twenty-one. It cannot be doubted that petitioner's statements of post-entry homosexual experiences loomed large in the determination by respondent. But since the charge herein is that he was excludable, the only pertinent evidence that should have been considered was that of prior entry.

The court below was not unaware of the problem this presents and hastened to explain it away:

> In the case before us, however, while the Special Inquiry Officer credited Boutilier's sworn statement which described in detail the full history of his homosexual behavior, there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition. (R. 41)

The dilemma of the court, however, is that the Public Health Service certification states it is based on the en-

tire statement and *there is not the slightest indication* in the opinion of the Special Inquiry Officer that he did not consider or was not influenced by the statement of post-entry conduct. His enumeration and discussion of all the post-entry acts firmly establish the opposite. (R. 26)

It may be suggested that under the holding of *Powlowec v. Day*, 33 F.2d 267 (CA-2) post-entry testimony is permissible to establish an excludable condition at time of entry. The situation in that case, and the few others that have accepted its rationale is materially different from the case at issue. In *Powlowec*, sometime after entry, petitioner was confined to an insane asylum after showing signs of mental derangement. His ailment was diagnosed by physicians there as "dementia praecox, hetephenia". On this evidence it was certified that recovery was impossible and that he was constitutionally psychopathic at the time of entry. As the court viewed it:

> The question is whether there is any evidence that shows him to have a mental makeup which falls within the phrase used in the statute.
>
> . . . When that is so, their (aliens) inferiority necessarily antedates their arrival here, because it is inherent in their nervous structure. (p. 268)

Central to the court's decision was its understanding that it was dealing with an inherent, psychotic condition. The post-entry diagnosis was provoked by manifestations of mental derangement that could only be the reflection of a condition organic and constitutional.

The substantive difference between the cases is that in the present case there is no evidence by respondent as to petitioner's psychological or physical *condition*. The evidence is only of his behavior, that is, of a number of homosexual experiences.

Finally, respondent has failed to prove petitioner's deportability by "reasonable, probative and substantial

evidence" to the required degree of certainty "that is clear, convincing and unequivocal". *Sherman v. Immigration & Nationality Service*, ___ U.S. ___ (12/12/66) 35 Law Week, 4053, 4055-4056. The only evidence offered by respondent — other than the Public Health Service certificate (R. 11) was the sworn statement of questions and answers (R. 1) upon which the certification was based. The statement of petitioner was taken by an immigration inspector without counsel for petitioner present and without petitioner being advised of the significance of the interrogation and the desirability that he consult counsel before submitting to such examination, which he was told must be voluntary (R. 1). As previously noted, this was a denial to petitioner of due process and the statement should have been excluded from the record. (Supra, footnote 1, p. 5)

IV

Section 212(a)(4) Has Been Unlawfully Used Here as the Means To Effect Petitioner's Deportation for a Ground That Has Not Been Authorized by Statute.

The grounds for which an alien may be deported are enumerated in the Immigration law. They alone are the grounds for which forfeiture of a resident alien's right to remain in the United States may be exacted. They may not be enlarged by administrative discretion or interpretation. The rule of law was stated in *Atlantic Insurance Agency v. Jordan*, 299 F.2d 758, 761 (CA-DC):

> Mr. Justice Holmes made the point in *Geigow v. Uhl*, 239 U.S. 3, 9 (1915) that when an administrator is specifically authorized to act under particular and enumerated conditions, his authority is limited to the granted circumstances; indeed, spelling out the respects in which he may act is tantamount to a denial of his right to an excess of his power in non-specified particulars.

Homosexual conduct is not among the grounds specified for deportation under the statute; neither is "being

afflicted with psychopathic personality". The respondent seeks to deport petitioner today because it disapproves of his sexual conduct over the course of his residence in the United States. To effect his deportation Section 241 (a)(1) is utilized ostensibly (but not truly) for an excludable condition at the time of entry.

In reality, the respondent has insinuated into Section 241(a) an added ground for deportation, to wit: "homosexual behavior". For the record upon which the order of deportation herein is based deals largely with petitioner's homosexual conduct since entry; it is meagre, indeed, with respect to such behavior before that time. What does the record establish as to that?

When he entered this country in 1955, petitioner was a young man of twenty-one. There was nothing about him at that time to warrant the immigration authorities to exclude him as a "psychopathic personality" as the respondent now charges that he was. In fact, he has lived in this country over ten years and there is no medical history showing him to have been at any time during this period a "psychopathic personality".

Insofar as his sexual behavior prior to entry is concerned, petitioner testified that he had been heterosexual also. (R. 6) His homosexual behavior was summarized by the Special Inquiry Officer: "* * * from the age of sixteen to the date of his first entry into the United States, about six years later, he [petitioner] engaged in homosexual activities on an average of three to four times a year". (R. 26)

On the basis of these sporadic youthful homosexual experiences only, it is not established that petitioner at the time of his entry was a "homosexual" or a "sex deviate". See statement of Dr. Tripp (infra, pp.).

The statement of the petitioner, which is the only evidence in this proceeding, shows that the questions put to him were directed to and dealt largely with his behavior

in this country after he entered. (R. 7-8) Furthermore, there is nothing in the certification of the Public Health Service's doctor or in the decision of the Special Inquiry Officer to indicate what weight was given to the admissions of the pre-entry sexual acts, or if there would have been any difference in their conclusions had petitioner experienced but two homosexual acts per year prior to entry, or only one such act, or even none, so long as there was the testimony with respect to post-entry sexual behavior.

There can be little doubt that the reason for petitioner's deportation lies in his frank acknowledgment of post-entry homosexual practices over the years of his residence in the United States. As pointed out in Point III hereof, it cannot be urged that such testimony was pertinent in relation to his condition at entry.(Supra p. 32)

The controlling factor in the present case is that there is no evidence by respondent as to petitioner's psychological or physical *condition at any time*. The evidence is only of his behavior, that is of a number of homosexual experiences. Petitioner's post-entry behavior was not shown to be related to his mental or physical condition prior to entry. Thus, the deportation order rests primarily on the evidence of such behavior alone. Absent a statutory provision therefor, petitioner's post-entry activities cannot be made deportable conduct regardless of how censureable respondent believes it to be. The attempt to achieve such deportation through the means of Section 241(a)(1) is constitutionally impermissible as a usurpation of power and a denial of due process of law. *Geigow v. Uhl*, 239 U.S. 3, 9.

CONCLUSION

The judgment of the Court below should be reversed; the order of deportation herein should be declared invalid; and deportation proceedings against petitioner terminated.

Respectfully submitted,

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Attorneys for Petitioner

On the Brief
DAVID M. FREEDMAN
BLANCH FREEDMAN

APPENDIX A

Nos. 37 and 38 of Petitioner's Signed Visa Application. (Facsimile Hereto Attached)

37. I have had the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of individuals excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are narcotic drug addicts or chronic alcoholics; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) persons afflicted with any other disease, physical defect or disability which is of such a nature as may affect such persons' ability to earn a living unless affirmatively established that they will not have to earn a living; (5) paupers, professional beggars or vagrants; (6) persons convicted of, or who have admitted committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions noted in the Act; (7) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (8) polygamists, practitioners or advocates of polygamy; (9) prostitutes, persons who have engaged in prostitution, persons coming to the United States solely, principally or incidentally to engage in prostitution, procurers and persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or persons who are or have been supported by or receive or have received the proceeds of prostitution, or persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any immoral sexual act; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to

become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons fallen into distress and removed, or persons removed as enemy aliens, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways; persons procuring, or who have sought to procure, visas or other documentation, or who seek to enter the United States by fraud or willful misrepresentation of a material fact; (15) immigrants not possessing valid unexpired immigrant visas, reentry permits, border crossing identification cards or other documentation required by the Act, and a valid unexpired passport or other suitable travel document or document of identity and nationality; (16) quota immigrants possessing visas not issued in compliance with the quota provisions of the Act; (17) persons ineligible to citizenship of the United States, or persons who have departed from or have remained outside the United States to evade or avoid military training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotics drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving therein by nonsignatory or noncomplying transportation lines; (20) persons seeking to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as specified in Sec. 212(a)(28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United

States Government by force, violence or other unconstitutional means, or join, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and certified to be helpless from sickness or mental or physical disability or infancy pursuant to Sec. 237(e) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes noted above because: I am not a member of any of the above mentioned classes.

45. [illegible] in the United States for the following period of time [illegible] during [illegible] violation:

Indefinitely | **Visits**

37. I [illegible] the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of [illegible] excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are [illegible] drug addicts or chronic alcoholics; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) persons afflicted with any other disease, physical defect or disability which is of such a nature as may affect such persons' ability to earn a living unless affirmatively established that they will not have to earn a living; (5) paupers, professional beggars or vagrants; (6) persons convicted of, or who have admitted committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions noted in the Act; (7) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (8) polygamists, practitioners or advocates of polygamy; (9) prostitutes, persons who have engaged in prostitution, persons coming to the United States solely, principally or incidentally to engage in prostitution, procurers and persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or persons who are or have been supported by or receive or have received the proceeds of prostitution, or persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any immoral sexual act; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons fallen into distress and removed, or persons removed as alien enemies, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways; persons procuring or who have sought to procure, visa or other documentation, or who seek to enter the United States by fraud or willful misrepresentation of a material fact; (15) immigrants not possessing valid unexpired immigrant visas, reentry permits, border-crossing identification cards or other documentation required by the Act, and a valid unexpired passport or other suitable travel document or document of identity and nationality; (16) quota immigrants possessing visas not issued in compliance with the quota provisions of the Act; (17) persons ineligible to citizenship of the United States, or persons who have departed from or have remained outside the United States to evade or avoid military training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotics drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving therein by nonsignatory or noncomplying transportation lines; (20) persons coming to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as described in sec. 212 (a) (28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United States Government by force, violence or other unconstitutional means, or join, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and certified to be helpless from sickness or mental or physical disability or infancy pursuant to Sec. 237 (c) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes noted above because:

I am not a member of any of the above mentioned classes.

[illegible] 50103

[illegible]

(Signature of applicant)

Subscribed and sworn to before me this 21 day of June

Fee No.

Hazel O. Briggs

United States Vice Consul.

APPENDIX B

Statement by
Clarence A. Tripp, Ph.D.

Curriculum Vitae

Born, Denton, Texas - 1919.

American Associate of Science degree, Rochester Institute of Technology, Rochester, N. Y. (1941)

Associated with National Psychological Association for Psychoanalysis, New York City. (1945-1947)

Consultant, Institute for Sex Research, Indiana University, Bloomington, Ind. (1948-1956)

Ph.D. degree in sociology and clinical psychology, New York University, New York City. (1957)

Clinical Instructor in Psychiatry, Downstate Medical Center, College of Medicine, State University of New York. (1955-1964)

Guest lecturer, School of Medicine, University of California, San Francisco, Calif. ("Sex Disorders in Clinical Practice; A course for Physicians".)

Private practice of psychotherapy. (1958 to date)

Author of a comprehensive study of male and female homosexuality (in preparation).

Homosexuality and Psychopathology
by
Dr. C. A. Tripp

Homosexual acts are those that occur between members of the same sex, just as heterosexual acts are those that occur between members of the opposite sex. While any sexual drive or response rests on a physiologic capacity to be stimulated or to respond sexually, it is the psychological conditioning of the individual that determines whether a particular kind of partner or situation

will elicit sexual interest. Since specific directional cues (what used to be called instincts) are lacking in man, young persons show a psychosexual neutrality that is reflected in their considerable catholicity of sexual response. (r, 4, 7 p. 258)* Any eventual directionality of response occurs as a result of "positive" conditioning toward certain kinds of objects (most frequently members of the opposite sex), and "aversion" conditioning toward objects that may be perceived as dissonant with the positively conditioned ones. This is not meant to imply that psychological conditioning occurs primarily as a result of overt sex experiences. A boy can come to admire (to the point of erotic response) certain qualities or attributes of members of either sex as a result of value judgments he has attained in the course of life experiences that may seem to have no sexual connotations at that time. (8)

Homosexual acts, then, are the result of learning in the same sense in which heterosexual acts are the result of learning. (7, p. 258, 10) Thus explanations of homosexual behavior in terms of underlying "degeneracy," "constitutional inferiority," "psychopathy" or "psychopathic personality" are inappropriate and consequently have been abandoned by medical and social science. For instance, all of these terms have been dropped as diagnostic categories from the STATISTICAL AND DIAGNOSTIC MANUAL of the American Psychiatric Association, officially adopted in 1951. (1)

The considerable emotional importance that has been attached to homosexual acts, and to persons discovered to be involved in them, has arisen for two apparent reasons. 1) Overt sexual activities of any sort tend to generate, in the associations of others, all or part of the emotion that would be involved in the actual acceptance or rejection of such activities. 2) The emotion aroused by the observation or the thought of any sexual activity is sharply intensified whenever that activity is, a) associated with powerful taboos, or b) when it appears dis-

*Numerical references in text refer to numbered bibliography following the statement.

sonant with "opposite" actions that are extremely attractive to the viewer, or c) when the action represents a surfacing of tendencies within the viewer that are held down by repressions he maintains against a secret readiness to respond in the same way.

One of the unfortunate results of this emotional charging of homosexual acts has been the widespread use of the word *homosexual* as a substantive noun referring to persons. (It is worth noting that during the 18 years of the Kinsey Research, during which Dr. Kinsey and his associates had occasion to use the word hundreds of times in their writings, lectures, and conferences, they never once used it as a substantive noun, nor as an adjective, to describe persons. Rather, they spoke only of *homosexual acts, homosexual responses,* or persons involved in the *homosexual,* etc. They strongly advised others to do the same.) (9, p. 617)

To speak of a person as "a homosexual" entails two troublesome distortions. 1) It amounts to classifying a person according to the sex of somebody else (the partner). 2) It implies that persons fall into categories of homosexual and heterosexual that are sharp enough to be used as classifications. The impact of this latter error is best appreciated if we use, as a general guide, the findings of the Institute for Sex Research which are, in part:

1) That a full 50 per cent of the adult white American male population admits some degree of erotic response to other males. (9, p. 656)

2) That 37 per cent of the adult white American male population has at least some overt homosexual experience after maturity. (9, p. 625)

3) That 10 per cent of white married males (25-year-old class) have at least some overt homosexual experience *after* being married. (9, p. 290, fig. 85)

4) That not more than 4 per cent of the total adult white American male population is exclusively in-

> volved with homosexuality — and, consequently, that nearly half (46 per cent) of the population falls into neither exclusively homosexual nor exclusively heterosexual categories. (9, p. 656)

Assuming the facts in the Boutilier case, to wit, that at age 14 he had his first homosexual experience, that such experiences occurred 3 or 4 times a year from age 16 to age 21, and that homosexual experiences (among others) have continued at this rate since his entry into this country, what classifications can and cannot be made? According to the data, Boutilier cannot be classed as either heterosexual or homosexual — particularly not at age 21 when these mixtures are especially common. Boutilier now falls into that 46 per cent of the population which shows a mixed sexual picture, and into the 37 per cent of the population that chooses to act-out some homosexuality. In no event can Boutilier be classed as "a homosexual" without violating part of his history, and/or forcing him into a category that would include a sizable portion of the whole white American male population.

There are, of course, instances in which homosexuality (and for that matter, heterosexuality) is associated with mental disorder — or with disturbances in a person's social behavior. Any piece of behavior that is taboo, or that is under tight social regulation, may be "thrown in the face of society" in the form of public displays by persons who have such poor "reality testing" that they simply do not know how to respect the surface demands of the society in which they live. Other individuals who perfectly well know the limits of social decorum, such as various "angry young men," may choose to flaunt taboo behavior as a means of expressing social protest. And still other individuals who are otherwise respectful of social rules may be so personally disturbed by their own tendencies, or by what they imagine to be giant differences between themselves and others, that they push forward some distorted fragment of this misinterpretation as an element of their own identity — as

seen, for instance, in the rare but dramatic display of the "painted fairy." But to confuse these sometimes psychotic or neurotic manifestations with examples of people who discreetly make similar sexual choices, but who are well-integrated socially in terms of meeting their material and social responsibilities, would be almost as serious as confusing rape with ordinary sexual intercourse.

In fact, it is part of the history of man's sexual interpretations that inconsequential events, masked by social taboos, at first seem to validate those taboos by appearing only in the bad company of anti-social behavior — eventually to be cleared of both their horror and importance by biologic and psychologic understanding. For instance, masturbation was thought for generations to be associated with mental disease because psychotic and mentally deficient persons were the ones seen doing it. After this illusion became apparent, there were various efforts to substantiate at least the abstinence part of the taboo. For instance, the American Medical Association adopted a formal resolution at its national convention in 1917 stating that there was "no evidence that abstinence from all sexual activity is inconsistent with the highest physical and mental efficiency." Today there is such evidence — coupled with a general understanding of the fact that the incidence rate on masturbation stands at not less than 96 per cent of the entire American male population. (9, p. 514)

Homosexuality has been subjected to approximately the same course of interpretation — from sharp taboo, to being associated with mental disease, to a general recognition of its commonplace frequency, and finally to its being seen as of small sociologic consequence, even though it may be of great personal importance to some of the participants.

The term "psychopathic personality" (including the variant nouns, "psychopath" and "psychopathy") is not now, and was not as far back as 1952, recognized as a

proper diagnostic category from which it could be inferred that such a person was engaged in homosexual conduct. (1) Just as a person involved in homosexual activities is not necessarily a psychopath, a psychopath is not necessarily involved in homosexuality. Consequently, explicit distinction between "psychopaths" and "real homosexuals". (2, p. 575)

The term "psychopath" has lingered on in the language of medicine and psychology in two main usages:

1) "Psychopath" survives as a general term denoting any kind of "mentally deranged person" (Oxford Universal Dictionary), or "an eccentric and queer person, one near the border of mental disorder" (6).

2) "Psychopath" is used as a global category to indicate behavior patterns characterized by general irresponsibility, unreliability, impulse-ridden social inadequacy, and an inability to distinguish between truth and falsehood.

It is this latter usage which governed the writing of the section on "Psychopathic States" in a standard reference work for psychiatrists and social scientists, the American Handbook of Psychiatry (2, pp. 567-588). The author states:

> "At a meeting of the American Psychiatric Association, or at a staff conference at a state hospital, if a physician expresses an opinion to one of his colleagues about a psychopath, it is clearly, and at once, understood that he is not speaking of a cyclothymic or schizoid personality or of ordinary homosexuality but of the grave character and behavior disorder so familiar to most psychiatrists as a distinct and easily recognized entity." (2, p. 568)

It is obviously with these distinctions and usages in mind that neither of the two psychiatrists who examined Boutilier found him to be afflicted with a psychopathic personality.

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   "Human homosexuality is not basically a product of hormonal imbalance or 'perverted' heredity. It is the product of the fundamental mammalian heritage of general sexual responsiveness as modified under the impact of experience." P. 259.

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   "It is not possible to insist that any departure from the sexual mores, or any participation in socially taboo activities, always, or even usually, involves a neurosis or psychosis, for the case histories abundantly demonstrate that most individuals who engage in taboo activities make satisfactory social adjustments. There are, in actuality, few adult males who are particularly disturbed over their sexual histories. Psychiatrists, clinical

psychologists, and others who deal with cases of maladjustment, sometimes come to feel that most people find difficulty in adjusting their sexual lives; but a clinic is no place to secure incidence figures. The incidence of tuberculosis in a tuberculosis sanitarium is no measure of the incidence of tuberculosis in the population as a whole; and the incidence of disturbance over sexual activities among the persons who come to a clinic is no measure of the frequency of similar disturbances outside of clinics." P. 201.

"It would encourage clearer thinking on these matters if persons were not characterized as heterosexual or homosexual, but as individuals who have had certain amounts of heterosexual experience and certain amounts of homosexual experience." P. 617.

"The data indicate that about 10% of married males have some homosexual activities during marriage. That this figure drops after the age of 25 is probably a reflection of cover-up, for there is no evidence of any significant difference in homosexual frequencies from one generation to the next." P. 631.

"Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeonholes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex." P. 639.

"The opinion that homosexual activity in itself provides evidence of a psychopathic personality is materially challenged by (our) incidence and frequency data. Of the 40 or 50% of the male population which has homosexual experience, certainly a high proportion would not be considered psychopathic personalities on the basis of anything else in their histories." P. 660.

"The homosexual has been a significant part of human sexual activity ever since the dawn of history, primarily because it is an expression of capacities that are basic in the human animal." P. 666.

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"In the United States today, why is homosexuality a problem? Mainly because it presents, in sexual form, the classic dilemma of popular democracy: How much diversity should society permit? Many people, eminent psychiatrists among them, do not distinguish between democracy and what Tocqueville called 'the tyranny of the majority'." P. 137.

"In our day, homosexuality is a moral, political and social problem. It is not enough, therefore, for psychiatrists to concern themselves with abstract notions of psychosexual health and disease and to disregard the more general problem of conformity versus diversity in a complex human society. Coercive measures aimed at reducing diversity of opinion or action, whether in the sexual or in the intellectual sphere, are destined to constrict society and thus the human personality." P. 138.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF THE HOMOSEXUAL LAW REFORM SOCIETY OF AMERICA, AMICUS CURIAE

INTEREST OF AMICUS

The Homosexual Law Reform Society of America (formerly The Janus Society of America) was formed principally to "work toward the improvement of prevailing attitudes, practices and laws respecting sexual behavior."

The Society has received letters from the Solicitor General of the United States and petitioner's counsel stating their consent to the filing of this brief.

While the Society is in general agreement with the arguments set forth in the brief for petitioner, the Society's brief is confined to the issue of the Constitutional propri-

ety of deporting an alien as "afflicted with psychopathic personality" solely on the basis of his admitted homosexual experiences, as this alone of the several issues falls clearly within the scope of the Society's purpose and expertise.

SUMMARY OF ARGUMENT

As the Government's effort to deport the petitioner is based upon its determination that he is "afflicted with psychopathic personality," and that determination is based solely on the occurrence of certain homosexual acts disclosed by the petitioner, the questions are raised whether the Government may, without violating due process, (1) infer psychopathology from homosexuality, without more; or (2) if not, declare as a matter of law that homosexuality indicates psychopathology.

An inference or presumption created by the legislature must be rationally connected to the ultimate fact to be established. *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Romano*, 382 U.S. 136 (1965). Therefore, the petitioner is denied due process of law unless psychopathology may reasonably be inferred from homosexuality as a matter of fact.

The term "psychopathic personality" is a medical or psychiatric term; it has no other meaning. It involves some kind of mental disorder or disease. There is widespread professional opinion that homosexuality *per se* does not indicate psychopathology in general or psychopathic personality in particular. Such scientific evidence as is available, particularly the testing and research of Hooker, DeLuca and Schofield, support that opinion.

The labelling of a person who commits homosexual acts as a "deviant" and as a "psychopathic personality" has to do with the preservation of society's dominant value system rather than with mental disturbance. It involves the abuse of psychiatric terminology for the purpose of social control. This is a step on the way to the "therapeutic state."

A decent society will not equate difference with deviance. Due process of law should be deemed to assure this element of decency.

ARGUMENT

By virtue of certain homosexual experiences admitted by the petitioner, doctors of the U. S. Health Service certified that at the time of his entry into the United States in 1955 the petitioner was a "psychopathic personality," to wit, a sexual deviate. The Government seeks to deport the petitioner.

As the Government gave the petitioner no medical or psychiatric examination, the issue is squarely raised whether "a homosexual" may, without more, be regarded as a psychopathic personality. This inquiry comprises two questions:

1. Does homosexuality *per se* indicate psychopathology?

2. If homosexuality *per se* does not in fact indicate psychopathology, can the Government in due process of law declare as a matter of law that it does?

The first question is pertinent only if the answer to the second is in the negative.

The second question, which should be considered first, touches upon the relationship of government and truth, of law and scientific knowledge.

"The growth of knowledge is one of the most irreversible forces known to mankind."[1] The advancement of civilization depends upon the gradual triumph of scientific knowledge over "folk knowledge."

> "The fundamental difference between scientific knowledge and folk knowledge . . . is that the folk knowledge is derived essentially from empirical inference and casual observation whereas scientific knowledge is derived from necessary infer-

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[1] Boulding, Kenneth, *The Meaning of the 20th Century*, Harper and Row (New York, 1964), p. 23.

> ence from theoretical models according to the mathematical logic and carefully organized observations guided by inventions which extend the power of the senses. Scientific and folk images are frequently inconsistent, and as it is always painful to abandon an image, a struggle between the two ensues."[2]

This case is part of the struggle now taking place between the scientific image of homosexuality (or of homosexual conduct) and the folk image of it. In terms of law, it raises the question whether the Government may Constitutionally select and punitively apply the folk image in disregard of the emerging scientific knowledge.

James Otis in 1764 framed the same issue as between Parliament's laws and natural laws:

> "There must be in every instance, a higher authority, viz. God. Should an act of parliament be against any of *his* natural laws, which are *immutably* true, their declaration would be contrary to eternal truth, equity and justice, and consequently void . . . When such mistake is evident and palpable . . . the judges of the executive courts have declared the act 'of a whole parliament void'."[3]

In contemporary terms, Walter Lippman recently restated this issue in an address sponsored by the Center for the Study of Democratic Institutions:

> ". . . in the field of truth and error about the nature of things, and of the history and future of the universe and of man, the state and its officials have no jurisdiction. When the scholar finds that two and two make four, no policeman, no judge, no governor, no legislature, no trustee, no rich alumnus, has any right to ordain that two and two make five . . . Here, it is the community of scholars who are the court of last resort."[4]

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[2] *Ibid.*, p. 56.

[3] "Rights of the British Colonies," Quoted in Commager, Henry Steele, *Living Ideas in America*, Harper and Brothers, Incorporated (New York, 1951), p. 124.

[4] "The University," *The New Republic*, May 28, 1966, p. 18.

Once it is recognized, for example, that "There neither are nor ever were witches, that having made a compact with the devil, can send a devil to torment other people at a distance," the judicial labelling and punishing of people as witches must come to an end. [5]

The Supreme Court has recognized that an inference or presumption created by the legislature must be rationally connected to the ultimate fact to be established. *Tot v. United States*, 319 U.S. 463 (1943). See also *United States v. Romano*, 382 U.S. 136 (1965).

Therefore, if it be found that homosexuality *per se* may not reasonably be deemed to indicate psychopathology, the Government's imposition of such an inference or presumption deprives the petitioner of due process of law.

The first question, involving the validity of that inference or presumption, is, therefore, raised: does homosexuality *per se* indicate psychopathology? Or has the scientific knowledge of homosexuality undercut the folk image of "the homosexual" as "sick"?

The Court below sought to avoid this issue by holding that in its reference (in the Immigration and Nationality Act of 1952 (66 Stat. 163; Title 8, U. S. Code)) to "aliens afflicted with psychopathic personality," [6]

> ". . . Congress utilized the phrase 'psychopathic personality' not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States" 363 F.2d at 494.

The term "psychopathic personality," unfortunately for that effort, *is* a medical or psychiatric term. Whether or not is has meaning as such, which is another question, clearly it has no other meaning.

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[5] See Cantor, G., "How Black is Black?" *The Legal Intelligencer* (Philadelphia), July 21, 1966, p. 1.

[6] See 212(a)(4), 8 U.S. Code § 1182.

Webster's New International Dictionary, Third Edition, defines psychopathy as:

> "1. Mental disorder in general.
>
> "2. More commonly, mental disorder not amounting to insanity or taking the specific form of a psychoneurosis, but characterized by defect of character or personality, eccentricity, emotional instability, inadequacy or perversity of conduct, undue conceit and suspiciousness, or lack of common sense, social feeling, self-control, truthfulness, energy, or persistence. Different psycopathic individuals show different combinations of these traits.
>
> "3. Incorrectly, psychotherapeutics." [7]

The principal meaning of the prefix *"psycho-,"* as given by the same source is: "combining form, Greek *psycho-, psych-,* from *psyche,* meaning *life, soul,* as in *psycho*pannychism, *psycho*stacy, used to denote: *a Mind, mental processes and activities,* as in *psycho*logy, *psycho*metric, *psycho*dynamic, *psychi*atry. [8]

Pathology, of course, refers to disease:

> "1. The science treating of diseases, their essential nature, causes . . . and development, and the structural and functional changes produced by them . . .
>
> "2. The morbid changes, collectively, arising in disease; the condition, as of an organ, tissue, or fluid, produced by disease; as the *pathology* of the nervous system, of the mind, of childhood.
>
> "3. The study of the effects of emotion on the subject. *Now Rare.*" [9]

That the term "psychopathic personality" relates to the mind, and to the mind's illness, disease or disorder of some kind is inescapable. The linguistic roots, the dic-

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[7] Page 2002.

[8] Page 2001.

[9] *Ibid.*, p. 1792.

tionary definitions, and the professional utilization of the term and its component parts all point to the same conclusion.

Similarly, the statute itself shows that Congress intended to use a medical or psychiatric term. Section 212 (a)(4), 8 U.S. Code § 1182, refers to aliens afflicted with "psychopathic personality, epilepsy, or mental defect," a strange (and misleading) grouping if one of the three is not a medical or psychiatric term. Further, Section 234, 8 U.S. Code § 1224, provides for the physical and mental examination of arriving aliens by *medical officers* of the United States Public Health Service, who are to certify any "physical and mental defect or disease" observed by them. There is no alternate arrangement for others to detect non-medical and non-psychiatric personality disorders, whatever they might be.

Moreover, the Court below implicitly agrees [10] that if the issue had been raised upon the petitioner's entry into the country, rather than in subsequent deportation proceedings, Section 234, *supra*, would apply. But what would be the relevance if a report by *medical officers* of the U. S. Public Health Service as to the alien's "psychopathic personality" *if the latter is not a medical term*?

We are left then, with the question as originally framed without the judicial gloss attempted by the Court of Appeals: does homosexuality *per se* indicate psychopathology?

To amplify this question: assuming (1) that the term "homosexual" can properly be applied to a person rather than an act, (2) that the term homosexual can properly be applied to the petitioner in this case, and (3) that the term "psychopathic personality" can be understood (even) as a medical or psychiatric term—each of these assumptions being unproved and subject to serious question—does the petitioner's homosexuality indicate some sort of mental disease or disorder (psychopathology)?

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[10] 363 F.2d at 492.

England's famous Wolfenden Report[11] faced this issue precisely. Recognizing that there is no legal definition of "disease" or "disease of the mind," and no medical definition that covers all of its varieties, the Report adopted the "traditional view" that for a condition to be recognized as a disease three criteria must be met:

> "(i) the presence of abnormal symptoms, which are caused by (ii) a demonstrable pathological condition, in turn caused by (iii) some factor called 'the cause,' each link in this chain being understood as something necessarily antecedent to the next."[12]

The evidence suggested to the Committee that homosexuality does not satisfy any of those three criteria "unless the terms in which they are defined are expanded beyond what could reasonably be regarded as legitimate."[13] The Report, in this context, goes on to say:

> "Besides the notion of homosexuality as a disease, there have been alternative hypotheses offered by others of our expert witnesses. Some have preferred to regard it as a state of arrested development. Some, particularly among the biologists, regard it simply as a natural deviation. Others, again, regard it as a universal potentiality which can develop in response to a variety of factors.
>
> "We do not consider ourselves qualified to pronounce on controversial and scientific matters of this kind, but we feel bound to say that the evidence put before us has not established to our satisfaction that homosexuality is a disease."[14]

Scientific knowledge of homosexual behavior and of so-called homosexuals is limited but growing. Dr. Evelyn Hooker, Research Associate in Psychology at the University of California at Los Angeles, gave a series of psychological tests to a group of 30 homosexuals and

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[11] Report of the Committee on Homosexual Offences and Prostitution, Lancer Books (New York, 1964).

[12] *Ibid.*, p. 30.

[13] *Ibid.*, p. 31.

[14] *Ibid.*, p. 33.

30 heterosexuals matched for age, I.Q. and education. The homosexuals were chosen on the basis of good adjustment and function in the community. Dr. Hooker's hypothesis was that homosexuality is not necessarily a symptom of pathology. The test materials were analyzed by different, independent judges who did not know whether a record was that of a homosexual or a heterosexual. The judges could not readily identify whether the record was that of a homosexual or heterosexual subject. Various ratings of the subjects' "adjustment" were made on the basis of the test results, and there was no significant difference between the homosexuals and the heterosexuals.

Dr. Hooker's tentative conclusions were:

> "1. Homosexuality as a clinical entity does not exist. Its forms are as varied as those of heterosexuality.
>
> "2. Homosexuality may be a deviation in sexual pattern which is within the normal range, psychologically . . .
>
> "3. The role of particular forms of sexual desire and expression in personality structure and development may be less important than has previously been assumed. Even if one assumes that homosexuality represents a severe form of maladjustment to society in the sexual area of behavior, this does not necessarily mean that the homosexual must be severely maladjusted in other sectors of his behavior. Or, if one assumes that homosexuality is a form of severe maladjustment internally, it may be that the disturbance is limited to the sexual sector alone."[15]

Dr. Joseph N. DeLuca, now Director of the Psychology Department of the New Jersey State Hospital, Greystone Park, New Jersey, gave a series of tests to 42 overt homosexuals and 25 heterosexual controls, all of whom were Army inductees at Fort Jackson, South Carolina. He reported:

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[15] Hooker, Evelyn, "The Adjustment of the Male Overt Homosexual," in Ruitenbeek, Hendrik M., *The Problem of Homosexuality in Modern Society*, E. P. Dutton & Co., Inc. (New York, 1963), pp. 160-161.

"The results of the study suggest that homosexuals do not constitute a homogeneous group and that homosexuality does not exist as a distinct clinical entity. . . .

"The issue of whether homosexuals are more pathologic than normals, in the light of the present findings, seems to have been an unwarranted assumption, based more on armchair theorizing than experimental evidence . . ." [16]

In England, Michael Schofield studied three classes of homosexuals, (1) those in prison, (2) those currently under treatment, and (3) those who had never been in prison or under treatment. He used three control groups which were composed of (1) pedophiles, (2) heterosexuals currently under treatment, and (3) heterosexuals who had never been in prison or under treatment. Each of the six groups studied comprised 50 persons. As a result of his research and studies, he arrived at the following formulation:

"Homosexuality is a condition which in itself has only minor effects upon the development of the personality. But the attitudes, not of the homosexual, but of other people towards this condition, create a stress situation which can have a profound effect upon personality development and can lead to character deterioration of a kind which prohibits effective integration with the community.

"A proportion of homosexuals are unable to withstand the pressures from outside and become social casualties. These are the homosexuals most often found in prisons and clinics. Their difficulties may take a form not directly associated with the homosexual condition, although originally caused by the social hostility shown towards homosexuality. On the other hand the homosexuals who have learnt to contend with these social pressures can become adjusted to their condition and integrated with the community. These men are hardly ever found in prisons and clinics." [17]

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[16] DeLuca, J. M., "The Structure of Homosexuality," *Journal of Projective Techniques and Personality Assessment*, May, 1966. A copy of this article is annexed hereto as Appendix A.

[17] Schofield, Michael, *Sociological Aspects of Homosexuality*, Little, Brown and Company (Boston, 1965), p. 203.

The scientific data is not uniformly accepted by psychiatrists and psychoanalysts. While many agree that homosexuality is not necessarily psychopathology, others insist that pathology is involved. In doing so, they either ignore the experimental data entirely, *viz.*, Dr. Philip H. Heersema, "Homosexuality and the Physician," *Journal of the American Medical Association*, September 6, 1965, or they question the methods, *viz.*, Bieber, Irving H. et al., *Homosexuality*, Basic Books (New York, 1962).[18]

A clear distinction should be drawn between research conducted in accordance with the principles of the scientific method, on the one hand, and assumptions, on the other. Thus the *assumptions* of psychoanalytic theory offer resistance to scientific data:

> "All *psychoanalytic* theories *assume* that adult homosexuality is psychopathologic . . ."[19] ("Assume" emphasis supplied.)

Compare, however, the observation of Dr. Judd Marmor, Director of the Division of Psychiatry of Cedars-Sinai Medical Center, Los Angeles, California:

> "If the judgments of psychoanalysts about heterosexuals were based only on those they see as patients, would they not have the same skew impression of heterosexuals as a group?"[20]

Sigmund Freud, in his famous "Letter to an American Mother,"[21] advises that homosexuality:

> ". . . cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. . . . *If* he is unhappy, neurotic, torn by conflicts, inhibited in his social life, analysis may bring him harmony, peace of mind, full efficiency, *whether he remains a homosexual or gets changed.*" (Emphasis supplied.)

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[18] Pages 305-306.

[19] Ibid., p. 18

[20] Appendix D, p. 60.

[21] Reprinted in Ruitenbeek, *op. cit.*, pp. 1-2. A copy of Freud's "Letter" is annexed hereto as Appendix B.

In order to cast further light on the question whether homosexuality *per se* indicates psychopathology, the *amicus curiae* addressed a letter, in the form annexed hereto as Appendix C, to prominent persons in the fields of psychoanalysis, psychiatry, psychology, sociology, anthropology and biology, in the United States and abroad. Each was asked for a letter "outlining your position in reference to the question of homosexuality and psychopathology."

Copies of all of the letters timely received, excepting only those in which the writer expressed either his want of competence in this area or his lack of time to reply, are annexed hereto as Appendix D. [22] On the specific question raised, the following responses are typical:

Dr. Judd Marmor:

> ". . . current scientific evidence shows no justification for classifying homosexuals automatically as psychopathic personalities. To do so is a clear indication of stereotyping based on social prejudice and not on scientific evidence."

Dr. Harry Benjamin: "Homosexual behavior cannot possibly be interpreted as evidence of a 'psycopathic personality'."

Dr. Hendrik M. Ruitenbeek: "It is my firm and considerate [considered] opinion that there is no link between homosexuality and psychopathology."

Michael Schofield: "The idea that homosexuality is pathological is incorrect . . ."

Dr. Isadore Rubin:

> "It is my professional opinion that any attempt to classify an individual as a 'psychopathic personality' purely on the basis of the fact of his homosexuality is both grossly unjust and highly unscientific."

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[22] Also annexed as Appendix E, is a collection of opinions entitled: "Is Homosexuality a Sickness" compiled by the Committee on Religious Concerns of the Mattachine Society of Washington.

Dr. Paul H. Gebhard: ". . . homosexuality is not a pathology in itself nor necessarily a symptom of some other pathology."

Dr. Norman Reider:

> "Homosexuality *per se* is no evidence of psychopathology . . . To relegate by definition homosexuality into the category of 'psychopathic personality' has been for years a convenient dispositional device by armed services, courts and diagnostic centers. This practice is falling away by all scientifically-minded workers in the field as evasive, unscientific and discriminating."

Dr. Ernest van den Haag: ". . . I find no reasons and no evidence to assume that homosexuals have a 'psychopathological' personality."

Dr. Ray B. Evans: "It is grossly inaccurate to confound psychopathic or sociopathic characteristics with sexual preferences."

Dr. Thomas S. Szasz: "In my judgment, homosexuality is neither a bodily disease, nor a mental illness, nor a symptom or manifestation of 'psychopathic personality'."

Dr. Lester A. Kirkendall: "Just as heterosexuality cannot be automatically equated with healthy personalities, so is it impossible to equate homosexuality with 'psychopathic personality'."

Dr. Peter M. Bentler: "The available data indicate any randomly selected homosexual would be no more likely to be psychopathic than any randomly selected heterosexual."

Other letters in Appendix D include similar statements, some include opinions less clearcut, and a few refrain from answering the question precisely. A number of the letters contain useful analyses of the subject, to which the attention of the Court is invited. Among those is the comment of Dr. Albert Ellis, Executive Director of the Institute for Rational Living:

> "Although a case might be made that all exclusive fixed homosexuals are more or less neurotic, it could also be contended that all exclusive fixed heterosexuals are also neurotic since they are fixated on one kind of sexual behavior, and have great difficulty in engaging flexibly in other kinds of behavior."

The same position is precisely developed in Norman O. Brown's psychoanalytical interpretation of history, *Life Against Death:*[23]

> "The discarded elements of infantile sexuality are, judged by the standard of normal adult sexuality, perverse. The adult sexual perversions, *like normal adult sexuality*, are well-organized tyrannies: they too represent an exaggerated concentration on one of the many erotic potentialities present in the human body, which are all actively explored in infancy. The manner of this tyranny, as well as the *close connection between normal and perverted sexuality*, is illustrated by the fact that various erotic activities, which are called perversions if they are pursued as substitutes for the normal sexual act, are called legitimate if they are subordinated as preliminaries to the normal sexual aim. Children, on the other hand, explore in indiscriminate and anarchistic fashion all the erotic potentialities of the human body. In Freudian terms, children are polymorphously perverse. But if infantile sexuality, judged by the standards of normal adult sexuality, is perverse, by the same token *normal adult sexuality, judged by the standard of infantile sexuality*, is an unnatural restriction of the erotic potentialities of the human body." (Emphasis supplied.)

The point here is not to demonstrate that we are all neurotic, but to recognize that in labelling the homosexual as a sexual deviant and a psychopathic personality (and other things as well), we have not discovered a classification of disturbed persons; rather we have created such a classification in the purposeful but unscientific pursuit of certain non-medical ends.

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[23] Brown, Norman O., *Life Against Death*, Vintage Books (New York, 1959), p. 27.

This becomes even clearer when we consider the Kinsey data on homosexual behavior.

> "Kinsey's statistics indicated that about 4 per cent of adult white males are exclusively homosexual after adolescence, and that about 10 per cent of the total male population is to a greater or lesser degree exclusively homosexual for at least three years some time between the ages of sixteen and sixty-five."[24]

An even more remarkable finding was that at least 37 percent of the total male population has had some overt homosexual experience, some time between puberty and old age. The Kinsey Report stated:

> "The opinion that homosexual activity in itself provides evidence of a psychopathic personality is materially challenged by these incidence and frequency data. Of the 40 or 50 per cent of the male population which has homosexual experience, certainly a high proportion would not be considered psychopathic personalities on the basis of anything else in their histories."[25]

The Kinsey statistics indicate, first of all, that homosexual conduct cannot *per se* be taken to refute normalcy unless we are prepared to accept a definition of "normalcy" that excludes nearly 40 per cent of the adult male population. The figures also show, importantly, that in a society that places a high value on heterosexuality, whatever the sources of that valuation may be, *a substantial part of the population has reason, in their own overt behavior, to fear the weakening of that value system.*

As Dr. Szasz has pointed out, the homosexual, because he rejects heterosexuality, undermines its value. Thus he threatens society not by his actual behavior but by the symbolic significance of his acts.[26] "Society," then,

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[24] Bieber, *op. cit.*, p. 16.

[25] Kinsey, Pomeroy, Martin, *Sexual Behavior in the Human Male*, W. B. Saunders Co. (1948), p. 660.

[26] Szasz, Thomas S., "Legal and Moral Aspects of Homosexuality" in Marmor, Judd, et al., *Sexual Inversion*, Basic Books, Inc., (New York, 1965), p. 135.

threatened from within and from without, labels certain persons as homosexuals and labels homosexuals as deviants (particularly psychopathic). Deviance, it should be recognized,

> "[I]s *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender.' The deviant is one to whom that label has been successfully applied; deviant behavior is behavior that people so label."[27]

By labelling the deviant, and applying certain sanctions as a consequence of the label, the social ideal (exclusive heterosexuality) is made clearer by contrast and is made alone to appear desirable. The ties among the non-deviant citizens, and their security in adhering to the social ideal, are strengthened by their common opposition to the rejected and excluded. In order to maintain and to dwell in the social paradise of acceptable behavior, we maintain a hell of deviance, to which the homosexual is assigned.[28]

The practice is in no way improved by the Government's use of psychological or psychiatric terminology: "psychopathic personality."

> "In the past, discrimination has been based chiefly on nationality, race, religion and economic status; today, there is a mounting tendency to base it on psychiatric considerations. Since these practices rest on allegedly scientific grounds, and are implemented by professional persons, the ethical issues they pose are especially delicate."[29]

If psychologists and psychiatrists wish to move beyond "mental illness" understood as (a) diseases of the brain, such as general paresis, and (b) diseases of the mind, i.e.

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[27] Becker, Howard S., *Outsiders: Studies in the Sociology of Deviance*, The Free Press of Glencoe, Inc. (New York, 1963), p. 9.

[28] See Reiwald, Paul, *Society and Its Criminals*, International Universities Press, Inc. (New York, 1950), Ch. VII.

[29] Szasz, Thomas S., *Law, Liberty and Psychiatry*, The Macmillan Company, (New York, 1963), p. 17.

functional illnesses such as schizophrenia, and to categorize and label what they regard from time to time as significant recurrent patterns of behavior, this does not justify the state in adopting those categories and labels and using them to enforce certain ethical, political and social norms.

That is precisely what the Government is doing to the petitioner in this case. Based on the commission of certain homosexual acts, and in disregard of the psychiatric evidence submitted on the petitioner's behalf, and in disregard of the widely held and scientifically buttressed view that homosexuality *per se* does not indicate psychopathology, the Government has utilized the label "psychopathic personality" and extended it by the "intent of Congress" automatically to include all homosexuals.

To permit this is to take a step in the direction of the "therapeutic state," which Dr. Szasz has described[30] and which was dramatized in Ward 7,[31] a depiction of a Soviet "lunatic asylum" which holds 6000 patients, only one of whom is a "lunatic" and the rest are "victims of their lot as Soviet citizens." The object of Ward 7 was "to damage, not to cure." "In fact, there were neither patients nor doctors but only jailers in charge of inconvenient citizens."[32]

"Is there no life, but these alone? Madman or slave, must man be one?"[33]

It is submitted that the better attitude toward "inconvenient" persons is that prescribed by John Stuart Mill:

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[30] *Ibid.*, Ch. 18.

[31] Tarsis, Valering, *Ward* 7, E. P. Dutton & Co., Inc. (New York, 1966).

[32] *Ibid.*, p. 25.

[33] From Matthew Arnold's "A Summer Night," in Palgrave, Frances T., *The Golden Treasury*, The Macmillan Company (New York, 1945), p. 469.

> "If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode . . . .
>
> ". . . different persons also required different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate . . . The same mode of life is a healthy excitement to one, keeping all his facilities of action and enjoyment in their best order, while to another it is a distracting burthen, which suspends or crushes all internal life. Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable."[34]

The matter, we suggest, should be laid to rest that simply. The scientific knowledge of homosexuality which is now available supports the proposition that homosexuality *per se* does not indicate psychopathology. If our scientific knowledge is incomplete, that gap does not justify, and due process should bar, the arbitrary labelling and punishment of the homosexual.

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[34]Mill, J. S., *On Liberty*, in *Great Books of the Western World*, Encyclopaedia Brittanica, Inc. (Chicago, 1952), Vol. 43, p. 299.

That homosexuality and heterosexuality represent anything other than "differences among human beings in their sources of pleasure" has not been established. A decent society will not stigmatize and punish as deviance that which is merely difference. The assurance of such decency should in this case be derived from the Constitutional guarantee of due process.

Respectfully submitted,

Gilbert M. Cantor
Attorney for the Homosexual Law Reform Society of America, Amicus Curiae

APPENDIX A

THE STRUCTURE OF HOMOSEXUALITY

JOSEPH V. DE LUCA
USAH, Fort Jackson, South Carolina

The purpose of this study was to contribute to an understanding of the reasons underlying the controversy and contradictory experimental evidence pertaining to the nature of homosexuality (Hooker, 1957, 1958; Wheeler, 1949; David, 1955; Fein, 1950; Dodge, 1960). The basic issues have been:

1. Do homosexuals comprise a homogeneous group; i.e., does homosexuality constitute a a clinical entity?
2. Are homosexuals, as a group, more pathologic than normals?
3. Is there a creative potential associated with homosexuality?
4. If homosexuality is a defense, what is the nature of the anxiety that motivates the appearance of this symptom?

The reasons for the lack of demonstrable experimental evidence in regard to all of the above questions appear to be that: pertinent hypotheses have not been employed that would provide meaningful evidence if either supported or disproved; the nature of the samples used has tended to be inadequate; inappropriate statistical models, e.g., parametric tests, are often employed; and the meaning of Rorschach responses has been distorted in attempts to explain away negative results.

Based upon a critical review of the literature and upon the main body of psychoanalytic theory in regard to homosexuality (Freud, 1948; Fenichel, 1946; Ferenczi, 1950), the following hypotheses were derived:

1. Differences in the structure of personality, as revealed by the Rorschach technique, exist among the active-vs.-passive and fellatio-vs.-sodomy dimensions of homosexuality.
2. Differences in the number and kinds of homosexual signs are a function not only of the presence or absence of homosexuality but also the subgrouping within the category of homosexuality.
3. The homosexual group will not employ a more primitive ego adaptation or show more primary process than the normals.
4. The homosexual group is not more creative as manifest by Klopfer's scheme for evaluating creative potentials (Klopfer, 1954).
5. The nature of the anxiety defended against varies with the variety of behavioral expression of homosexuality.

The independent variables consisted of ten subgroups within the category of overt male homosexuality (N = 42), the homosexuals as a whole (N = 42), and a control group of normals (N = 25). The dependent variables were 75 Rorschach dimensions and the 20 signs of homosexuality most often appearing in the literature (Wheeler, 1949). There was a total of 12 independent variables and 95 dependent variables.

The ten subgroups of homosexuality were based on the active-passive and fellatio-sodomy dimensions as well as those combinations of each dimension which in the author's experience had appeared often enough to suggest a subgroup. The ten subgroups were passive (N = 13), active (N = 10), active and passive (N = 19), active and passive fellatio (N = 8), active and passive fellatio and active and passive sodomy (N = 9), passive fellatio (N = 7), passive sodomy (N = 5), active fellatio (N = 6), fellatio (N = 21), and sodomy (N = 6).

METHOD

Subjects

All Ss had been recently inducted into the U.S. Army and were undergoing their basic training at Ft. Jackson, South Carolina. There were no significant differences in age, education, or intelligence as measured by the Army Classification Battery between any of the 12 groups. The mean age, education, and equivalent WAIS-IQ score for the homosexual groups was 21.1, 11.0, and 95, respectively. The normals' mean age, education, and intelligence were 21.8, 11.9, and 99, respectively.

Of the Ss who had a history of overt homosexual behavior and were currently engaged in homosexual activities, 95% indicated when questioned, that they were determined to continue this way of life and expressed no motivation to become involved in heterosexual activity. Eighty-five per cent of the Ss had been initially referred to the Mental Hygiene Consultation Service of the U.S. Army Hospital by their unit and the other 15% were self-referrals. Prior to seeing the Examiner (E), all Ss had been made aware of their impending separation from service. No S was used in the study, either homosexual or normal, who had a history of organicity or psychiatric hospitalization, who had the equivalent of a WAIS-IQ score of 80 or below, or who displaced clinical evidence of psychosis.

Twenty-five men who were also in basic training but temporarily confined to the hospital for upper respiratory infections (mostly bad colds) were used as normal controls. All of these Ss were selected by picking names from the ward roster at random.

PROCEDURE

Each homosexual S, after having met the criteria for selection, was seen by the E for an interview. The main purpose of the interview was to establish rapport. During the interview it was explained that he was going to be asked to do some things for research purposes that would probably contribute to the understanding of homosexuality. The same procedure was followed with the normal Ss except that they were not informed that the study was concerned with homosexuality. All Ss were cooperative.

The Rorschach technique was then administered according to the Klopfer method (Klopfer, 1954). Inquiry was always made as to the sex of the figures on card III. In addition, each S was asked to select the one card he liked the best and the one card he liked the least. Upon completion of the Rorschach, all homosexual Ss were asked about the characteristic manner in which they performed the homosexual act. They all tended to respond readily and described both the manner in which they often experienced the act as well as that from which they received the most pleasure. There were no discrepancies between desired manner and actual manner.

Scoring

The scoring of each Rorschach protocol was done on three separate occasions: the first, immediately after the administration; the second, several weeks later, with the identity of the group to which the S belonged missing; and the third, on those protocols where there was a disparity on the determinants assinged (3% of the cases). The scoring method used was Klopfer's (Klopfer, 1954). All Rorschach signs were scored according to the criteria set forth by Wheeler (1949).

RESULTS

The Kruskal-Wallis tests were used to determine whether the 12 groups represented significantly different populations in regard to the 75 Rorschach dimensions. A significant difference beyond the .001 level was revealed among the 12 groups on the following Rorschach dimensions: W, W , D, F, FM, M, FC, CF, Fc, cF, KF, H, A, Ad, At, Pl, response to chromatic cards %, response to achromatic cards %, total time, average reaction time, average RT achromatic cards, average RT chromatic cards. Significance between the .05 and .01 levels was found on the following dimensions: W:M, FM:M, CF, Fk, d, and dd; therefore, the 12 groups differed from each other beyond the .05 level on 28 of the 75 Rorschach dimensions.

The Mann-Whitney U test was applied to all pairs of groups that Kruskall-Wallis tests suggested were significantly different from each other. This was

done to see if some of the pairs were not significantly different from each other on a particular Rorschach dimension even through the 12 groups as a whole appeared to be from the initial Kruskal-Wallis analysis. All pairs differed significantly from each other beyond the .05 level.

The Fischer Exact Probability Test revealed that all 12 groups differed from each other beyond the .005 level, in the total number of signs obtained by each; however, chi-square analysis demonstrated that no individual sign was able to differentiate, beyond the .05 level, between the homosexuals as a whole and the normals, or any other pair of groups. Four of the 20 signs differed between the .10 and .06 levels (numbers 2, 6, 8, 15, and 19) with the homosexual and normal groups. There was no difference between the homosexual group as a whole and normals on signs, 5, 9, 13, 14, 17, 18, and 20, while signs 1, 3, and 7 loaded in the oposite direction (in favor of the normals).

Analysis with chi-square of the nature of the anxiety defending against revealed no significant relationship with the particular variety of homosexual behavior, e.g., active fellatio, passive sodomy, etc. The most common anxieties appeared to be concerned with psychosexual inadequacy, the father figure, and hostility and disgust toward the female figure. The normal group had significantly less ($p < .01$) hostility and disgust directed toward the female figure and significantly less anxiety connected with the father figure ($p < .05$). The normals were not significantly different from the homosexuals taken as a whole in regard to felt psychosexual inadequacy.

As manifested by per cent of poor-form responses and primitive defenses there was no significant difference found between any of the groups; the evaluation of creative potentials also produced no significant differences.

DISCUSSION

All of the hypotheses were supported by the statistical tests except number 5 and that part of hypothesis 2 which states that the kinds of signs recorded will be a function of the subgroup to which S belongs.

The results of the study suggest that homosexuals do not constitute a homogeneous group and that homosexuality does not exist as a distinct clinical entity. The homosexuals varied from each other as much as they did from the normals in regard to the structure of their personality. They were also distinctly different from each other in the total number of purported signs of homosexuality they accumulated. Although not associated with the particular variation the symptom took, the homosexuals evidenced large variation in the nature of the anxiety they were defending against. The psychoanalytic theories of homosexuality are not supported by the wide variation between subgroups. Previous studies have treated homosexuals as

a homogeneous group. When Es assume that a non-homogeneous group is homogeneous there are bound to be discrepancies in the literature.

The issue of whether homosexuals are more pathologic than normals, in the light of the present findings, seems to have been an unwarranted assumption, based more upon armchair theorizing than experimental evidence. Psychoanalytic theory has in part contributed to this assumption by frequently considering the symptom a result of faulty identificatory processes and pregenital fixations. Difficulties have also arisen from the fact that many Es assume by definition that homosexuality is pathologic, a view which often resulted in a refusal to look for psychopathology in a comparative sense.

The fact that no one Wheeler sign was able to differentiate significantly any of the groups from each other suggests that the use of individual signs may be premature. The use of the total number of signs obtained does appear to be a useful way to distinguish the groups from each other, especially the normals from the homosexuals.

The theoretical propositions which suggest a difference in creative potential for homosexuals as compared to normals may have to be modified if there is continuing evidence for no difference.

The results of this study should be held applicable only to young adult white males of average intelligence who have completed approximately 11 years of education. These results do, however, have broader implications in that they suggest that the label, clinical entity, as applied to other diagnostic categories, might well become suspect if similar investigations were also carried out on Ss representing such categories.

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APPENDIX B

Sigmund Freud*

LETTER TO AN AMERICAN MOTHER

April 9, 1935

DEAR MRS. X

I gather from your letter that your son is a homosexual. I am most impressed by the fact that you do not mention this term yourself in your information about him. May I question you, why do you avoid it? Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too. If you do not believe me, read the books of Havelock Ellis.

By asking me if I can help, you mean, I suppose, if I can abolish homosexuality and make normal heterosexuality take its place. The answer is, in a general way, we cannot promise to achieve it. In a certain number of cases we succeed in developing the blighted germs of heterosexual tendencies which are present in every homosexual, in the majority of cases it is no more possible. It is a question of the quality and the age of the individual. The result of the treatment cannot be predicted.

What analysis can do for your son runs in a different line. If he is unhappy, neurotic, torn by conflicts, inhibited in his social life, analysis may bring him harmony, peace of mind, full efficiency, whether he remains a homosexual or gets changed. If you make up your mind he should have analysis with me!! I don't expect you will!! He has to come over to Vienna. I have no intention of leaving here. However, don't neglect to give me your answer.

Sincerely yours with kind wishes,

FREUD

P.S. I did not find it difficult to read your handwriting. Hope you will not find my writing and my English a harder task.

* SIGMUND FREUD, the founder of psychoanalysis, was born in 1856 in Austria and died in 1939 in London. Some of Freud's most famous and significant books are: *The Interpretation of Dreams, On Dreams, The Psychopathology of Everyday Life, The Origin and Development of Psychoanalysis, Three Contributions to the Theory of Sex, Totem and Taboo, Beyond the Pleasure Principle, Civilization and Its Discontents, The Future of an Illusion,* and many others.

APPENDIX C

[redacted]

HOMOSEXUAL LAW REFORM SOCIETY

[redacted]

reform of penal, social and religious laws affecting homosexuals.

suite 206
34 south 17th street
philadelphia, pa. 19103
215 LOcust 3-5100

The United States Immigration and Naturalization Service (INS) is attempting to deport an alien Canadian on the grounds that, as a male homosexual (the fact of his homosexuality is not contested by the defense) he is a "psychopathic personality." Under Federal law "psychopaths" are barred from immigration in the United States.

At the trial on the issue, the INS presented no testimony to support its assumption that homosexuality was pathological or that the individual in question was a "psychopathic personality" — except to let the fact of his homosexuality class him thus. Two independent psychiatrists testified that the particular man in question shows no sign of psychopathology — unless the fact, of his homosexuality was assumed, of itself, to be pathology. On July 8, 1966, the United States Court of Appeals for the Second Circuit (New York) upheld the INS ruling.

Because there are conflicting California cases, the United States Supreme Court was obliged 1/ by the Constitution to mediate the dispute. It accepted the case on November 7, 1966.

At the request of the defense counsel, the Homosexual Law Reform Society of America (formerly the Janus Society of America) has agreed to underwrite a considerable portion of the Supreme Court appeal and to sub-

mit an amicus brief on the question of psychopathology. Our brief will be short, point to the existing evidence, and conclude that homosexuality per se is not pathology. (A full and complete medical section will be appended to the defense brief.)

The HLRS feels that the most be made of this immigration case even though the point at issue is tangential to the central homosexual civil liberties questions. To this end we would appreciate your support of this case by your submitting a letter to us, briefly or in detail, outlining your position in reference to the question of homosexuality and psychopathology.

For your convenience we have attached an information sheet with additional data you might require.

Our full brief must be in the hands of the Court by December 31, 1966 and we earnestly hope that you will be able to take time from your busy schedule to help both the individual involved and the dignity of homosexuals generally.

Yours truly,

Clark P. Polak
Executive Secretary

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1/ While the writer was subsequently advised of the technical error here, no letter of explanation was sent as the error did not alter the central question.

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APPENDIX D

FROM
DR. CLIFFORD ALLEN

TELEPHONE:
[illegible]

148, HARLEY STREET,
LONDON, W.1.
[illegible]

12.12.66

The Executive Secretary,
The Janus Society of America
34S 17th Street,
Philadelphia, Pennsylvania, U.S.A.

Dear Mr. Polak,

Thank you for your letter. I presume that you have written to me because I have done considerable research on homosexuality and have written widely on it. I have recently retired after working in Harley Street as a consultant psychiatrist for some thirty years. In addition I have been Consultant in Charge of the Psychiatric Department of the Seamen's Hospital at Greenwich, London, and Consultant Neuro-psychiatrist to the Ministry of Pensions, London. My books are A Textbook of Psychosexual Disorders, published by the Oxford University Press, Homosexuality published by Staples of London, and Modern Discoveries in Medical Psychology published by Macmillan. I have published also some fifty papers, mainly on sexual abnormality.

In such matters as homosexuality and psychopathy it is wise to define what one is discussing. Homosexuality is usually taken as being attracted to someone of the same sex, sometimes to the point of intercourse ending in orgasm, but this is not always so. By psychopathy we usually mean acting in an antisocial manner (i.e. to the injury of others or society as a whole,)

About five per cent of the population is believed to be permanently homosexual but many people pass through it as a transient phase. Kinsey produced statistics to confirm this. I know of no statistics to show that homo-

sexuality is associated with psychopathy any more than it is associated with heterosexuality. Indeed, such psychopathic activities as rape rarely occur in homosexuality whereas they are common with abnormal heterosexual men. A very large majority of homosexual men behave quietly, go about their business without disturbing, or interfering with others and may be useful citizens. As a general rule the homosexual is not a violent person although homosexuality may be associated with violence, just as heterosexuality but there is no evidence that this is more in one condition than the other. This opinion is upheld by such an expert as Benjamin Karpman, Chief Psychotherapist at St. Elizabeth Hospital, Washington, D.C. who says, "Homosexuality amongst delinquents is a symptom of personality maladjustment manifested in other departments of life other than sexual." And again, "Homosexuals are not as apt to commit non-sexual crimes as are other deviates."

There is a strong probability that homosexuality is much more associated with genius rather than psychopathy. Thus, Gide, Proust, Marlowe, and Francis Bacon were undoubted homosexuals. Leonardo da Vinci, and Donatello as well as Michael Angelo were all known as homosexuals in their lifetime. Tchaikowski and possibly Wagner amongst the musicians were said to show homosexuality. Other men who were somewhat homosexual by implication were Byron, Shelley, Tennison and Goethe. Shakespeare's sonnets are very homosexual and Verlaine's behaviour with Arthur Rimbaud showed a similar attachment. It would be easy to add many more names to this sketchy list.

In my opinion, based on more than thirty five years experience with homosexuals, these people should not be treated in any way other than normal people unless and until they show any antisocial behaviour.

Yours sincerely,

/s/ Clifford Allen, M.D.
M.R.C.P., D.P.M.

ALFRED AUERBACK, M. D.
450 SUTTER STREET
SAN FRANCISCO 8, CALIFORNIA
GARFIELD 1-8630

December 19, 1966

Mr. Clark P. Polak
Executive Secretary
Homosexual Law Reform Society
of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

My name is Alfred Auerback, M.D., 450 Sutter Street, San Francisco, California, and I specialize in the practice of psychiatry. Currently I am Vice President of the American Psychiatric Association and Associate Clinical Professor of Psychiatry at the University of California School of Medicine, San Francisco. My other positions include the following: Member, Mental Health Advisory Board, San Francisco; member, California State Commission on Staffing Patterns; member, Board of Directors, San Francisco Medical Society and its Judicial Council; and member, Mental Health Committee, California Medical Association. I have been Chairman of Symposia, "Sexual Problems in Clinical Practice" at the University of California School of Medicine Continuing Education in Medicine and the Health Sciences in 1965 and 1966.

On April 2, 1966, I presented the following report on Homosexuality in Seattle, Washington in a "Colloquium on Sexual Psychopathy" sponsored by the Washington State Medical Association and co-sponsored by the following:

Washington Superior Court Judges Association
Washington State Bar Association
Legislative Council Sub-committee on Judiciary

Legislative Council Sub-committee on Institutions and Youth Development
Washington Prosecuting Attorneys' Association
Washington State Department of Institutions
Washington Association for Mental Health
Washington State Psychological Association
District Branch, American Psychiatric Association
Washington State Medical Association
Board of Prison Terms and Parole
Washington Correctional Association
Governor's Commission Regarding Sexual Psychopaths and Psychopathic Delinquents
Mental Retardation and Mental Health Advisory Council
Members of the Legislature
Deans of the University of Washington School of Medicine, Law and Social Work and key department heads
Washington-Idaho Council of Churches.
Catholic Archdiocese of Seattle and Spokane
Washington Academy of General Practice
Washington Chapter, National Association of Social Workers
Washington State Department of Health
Washington State Department of Public Assistance
Office of the Superintendent of Public Instruction
Washington State Labor Council

On November 2, 1966 this same paper was delivered at the Annual Meeting of the American Public Health Association held in San Francisco.

Yours sincerely,

/s/ Alfred Auerback, M.D.

Enclosure

HOMOSEXUALITY

Homosexuality has existed throughout all recorded history, at times holding high social acceptance. Only in the last 100 years has it been the subject of open discussion. There has been and still is much confusion about its incidence. At the present, the Kinsey studies provide the best information. Kinsey found male homosexuality to be extremely widespread among the white American population and female homosexuality much less frequent. His findings were that 4% of white males are exclusively homosexual throughout their lives; 18% are almost exclusively homosexual for 3 or more years; 37% of all men have had at least one homosexual experience. He estimated that between 2 and 6% of unmarried women and about 1% of married women are homosexual. Studies in this country and elsewhere in the world do not refute the general pattern outlined by the Kinsey studies. These findings suggest that homosexuality is one of the most common psychological disorders known.

No biological basis for homosexuality has been found. Hormonal studies, even of extremely effeminate men, have shown no variations from normal. There are no measurable physical characteristics to differentiate the homosexual from the heterosexual. Most homosexual men function in our society as normal individuals, only a small percentage showing marked effeminate traits. The effeminate male has a strong need to renounce his biological sex and a conscious or unconscious desire to identify with women and may develop, sometimes to an exaggerated degree, the characteristics such as voice, gestures, and gait that are associated with femininity.

Psychological studies indicate that homosexuality arises from distortions in the individual's psychosexual development. During the child's formative years the absence of a parent, overattachment to a parent, lack of identification or overidentification, and conscious or unconscious parental seduction have all proven to be important to the etiology of homosexuality.

When the father is weak, absent from the home or psychologically displaced by the mother, the boy may overly attach himself to the mother. If the father is tyrannical and abusive to the mother or to the boy he will not identify with the father and will cling to the mother. When either parent is blatantly promiscuous, the boy may develop a fear or distaste of sex. If the mother's attitude is antisexual, he may develop the feeling that sexual expression is wrong, that women should not be defiled. In his teens when normal biological development would cause him to seek out girls, he considers women pure and untouchable and represses his sexual feelings, at times diverting them towards men.

The female homosexual, or lesbian, has been studied less than the male. The law has concerned itself with the male homosexual and at times has punished him severely, but has given no recognition to the existence of female homosexuality. At present there are no laws pertaining to the lesbian. The little girl terrified of the father's violence or alcoholic outbursts may develop a fear of men. Identifying with a domineering mother can give her feelings of contempt for men. Absence of a father through desertion, death or divorce deprives her of an opportunity to develop those techniques that will make her attractive to men. This reduces her chances for marriage, and makes her more vulnerable to initiation into homosexual behavior.

All studies point to the importance of the developing child's relationship with the mother and father. In a warm, loving, consistent relationship with parental figures, during infancy and early childhood, the child incorporates their norms, rules, and social values, and learns his place in the world. In the absence of such relationships his identifications are distorted and the seeds for deviant behavior are planted. A most important variable affecting an individual's psychosexual orientation is the sex role to which he is assigned and in which he is reared. In other words, if the parents want a girl, the

advent of a male child poses a problem. They may consciously accept the child as a boy but unconsciously react to him as though he was a girl. His external appearance may be masculine, but the traits and attitudes instilled in him are feminine. As he grows to adolescence and adulthood he finds himself less and less equipped to react or to think as a male and a shift to homosexuality appears inevitable.

In recent years there has been increasing recognition that being homosexual in itself is not a crime. The Wolfenden Report in England recommended that many of the laws pertaining to homosexuality be eliminated. This recommendation successfully passed after long debate in the British Houses of Parliament.

There is increasing acceptance of the fact that homosexual behavior is not a sex crime; however, society has consistently frowned upon the seduction of the young male child or adolescent. There is some question as to whether homosexuality is really a psychological illness or merely a way of life for a large segment of our population. In most cases it cannot be changed by psychiatric treatment. It is probable that in years to come homosexual behavior between consenting adults will be socially acceptable if conducted in private.

HARRY BENJAMIN, M.D.
44 East 67th Street
New York, New York 10021

December 19, 1966

It is my long considered opinion that homosexuality (better: homosexual inclinations and behavior) is just one variety of sexual behavior in general. In itself, it is no more "pathological" than an oddly-shaped ear, strikingly red hair or left-handedness.

Homosexual behavior cannot possibly be interpreted as evidence of a "psychopathic personality." Too many homosexuals are well balanced people and too many definite psychopaths are completely heterosexual.

Perfectly healthy men and women, healthy in body and mind, can be sexually aroused by members of their own sex. This is as natural and normal to them as the attractiveness of the opposite sex is to heterosexuals.

A difficulty for the correct understanding of homosexuality arises from the fact that its etiology is not yet fully understood. In some people, their sexual behavior may be genetically anchored or could have been determined by prenatal neuro-endocrine influences. In others, childhood conditioning may have been responsible. In no case does homosexual development itself, in later life, indicate psychopathology. Such a concept belongs in the medical wastebasket, with the rest of the errors and superstitions of an ignorant past. To my mind, it ranks with the "toxicity" of the menstruating women, or the "vice" and harmfulness of masturbation.

/s/ Harry Benjamin, M.D.

Sent to the Janus Society

UNIVERSITY OF CALIFORNIA, LOS ANGELES
Department of Psychology
Los Angeles, California 90024

December 21, 1966

Mr. Polak:

By American Psychiatric Association definition, a homosexual is a character disorder - sociopath. Aside from definitions, there is no scientific evidence available that homosexuals show the personality characteristics associated with psychopathic disorders more than randomly selected individuals. Specifically, the crucial variables of (1) inadequate conscience development (2) lack of anxiety and (3) general lack of acceptance of constituted authority do not exist more in homosexuals than non-homosexuals.

There are, no doubt, homosexuals who are psychopathic individuals. In any particular case, competent psychological assessment must decide the question of psychopathy. The available data indicate any randomly selected homosexual would be no more likely to be psychopathic than any randomly selected heterosexual.

Sincerely,

/s/ Peter M. Bentler, Ph.D.
Associate Professor of Psychology
Staff Psychologist, Psychology Clinic

UNIVERSITY OF CALIFORNIA, DAVIS

DEPARTMENT OF PSYCHOLOGY

DAVIS, CALIFORNIA 95616

December 19, 1966

Mr. Clark P. Polak
Homosexual Law Reform Society of America
34 S. Seventeenth Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

Concerning your letter of December 7 (the Boutilier case): my reading of recent social psychological literature (in particular the work of Dr. Hokker) inclines me to the opinion that partial or total commitment to homosexual behavior is by no means sufficient justification for a diagnosis (or verdict) of "psychopathic personality." Whatever the reasons or causes for a homosexual preference may be, there is to my knowledge no reliable information to indicate that these reasons or causes also produce obviously socially dangerous behavior. Of course, the intense social-moral pressures experienced by an admitted or unadmitted "homosexual" individual in our culture may lead to unfortunate psychological consequences. But in this case the harm is not produced by the fact of homosexuality but by public reaction to it.

Yours truly,

/s/ Gordon Bermant
Assistant Professor

Northwest Mental Health Foundation, Inc.
John L. Butler, M. D.
MEDICAL DIRECTOR

PHONE 228-4126
1134 SW MARKET
PORTLAND, OREGON
97201

December 13, 1966

Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania

Dear Mr. Polak:

Since 1949 when I was the psychiatrist at the Naval Retraining Command in Norfolk, Virginia, I have been very much concerned about the plight of the homosexual in our contemporary society. I was one of the few psychiatrists in the Fifth Naval District at that time. You may recall that there was great concern about homosexuals in high places in government. There was a concerted effort to identify practicing homosexuals and to try to discharge them from the Naval Service. Consequently, many men accused of homosexuality were sent to the Fifth Naval District brig where I had to examine them. Since then, my interest in the plight of the homosexual has continued. I was again involved in a major problem of homosexuality when I was Mental Health Director in Idaho in 1955-58.

In my current practice, I work with a number of homosexuals and their families. Because of this full spectrum of direct clinical experiences with the homosexuals I certainly do have an opinion that might be of help to you.

I have concluded that the fact that a person practices homosexuality is not prima-facie evidence that he suffers any significant impairment of judgment, reasoning or of emotional expression. From this point of view, an

individual can engage in homosexual activities, can move consistently through the "gay world", and manage to avoid any significant impairment of vocational mental, emotional, intellectual or interpersonal functions. In many instances, the person who practices homosexuality has been trained to assume the attitudes and behavioral patterns of the opposite sex and is responding most appropriately to his training by following the pattern of attitudes and expressions he uses. To do differently would, perhaps, be evidence of psychopathology unless later experiences would help him reconstruct a new set of attitude and reaction pattern. I believe that the person who practices homosexuality may have experienced a significant deviation from the usual pattern of personality development in our society. This does present us with a social problem, but I vigorously protest the implication that homosexual practices alone are evidence of psychopathology.

My files are well-stocked with clinical information which might be of some service although I'm reluctant to use the time at this writing, to pull together any more details than the opinion above and I hope you will find it useful.

Sincerely,

/s/ John L. Butler, M.D.
Medical Director

Psychopathology and Homosexuality

Joseph N. DeLuca, Ph.D.
290 Madison Avenue
Morristown, New Jersey

Based upon my work as a research scientist studying human behavior, I have not found homosexual men to be significantly different from "normal" men in the degree of psychopathology they evidence. Most of the homosexual men studied by me were not defending against conflicts or anxieties that were any different from there being dealth with by "normal" men of the same age, intelligence, and educational status. My findings therefore suggest that homosexuals are not "sicker" or more pathologic than non-homosexual men.

There was also no evidence that any particular form of deviant behavior (psychosis, psychopathy, neurosis) accompanied the homosexual behavior more often than it was seen in the behavior of non-homosexual men or "normals".

To assume that homosexuality, by definition, is pathologic appears to be an unwarranted assumption.

References

DeLuca, J.N. The dynamic structure of the sexual deviations. Paper read at the VIth International Congress on Rorschach, Paris, July, 1965.

DeLuca, J. N. The structure of homosexuality. Journal of Projective Techniques and Personality Assessment. May, 1966.

DeLuca, J. N. Psychosexual conflict in homosexuality. Unpublished manuscript.

AMERICAN PHILOSOPHICAL SOCIETY
held at Philadelphia
for Promoting Useful Knowledge

104 South Fifth Street
Philadelphia, Pa. 19106

December 9, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 South 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak,

I am definitely of the opinion that homosexuality per se is not psychopathology and that it is a gross injustice to exclude a person otherwise eligible for residence in the United States on this ground, as in the Boutilier case cited in your letter of December 7.

Sincerely yours,

/s/ George W. Corner, M.D.
Formerly Chairman,
Committee for Research in
Problems of Sex
National Research Council

UNIVERSITY OF CALIFORNIA, BERKELEY

SCHOOL OF CRIMINOLOGY

BERKELEY, CALIFORNIA

December 19, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

I am very much interested in the legal issue described in your letter of December 7. However, I fear that I am not able to make the kind of statement which would be helpful in your case. I do not think that homosexuality is necessarily indicative of a "psycho-neurosis". I am not prepared to state that homosexuality, in itself, is not psychopathological. In other words, I do not subscribe to the theory that homosexuality can be "normal".

I am sure you will understand my position when I tell you that I was trained as a Freudian psychoanalyst.

I would deeply appreciate it if you would keep me informed of the outcome of your case.

Sincerely yours,

/s/ Bernard L. Diamond, M.D.
Professor

RALPH B.ELIAS, M.D., D.A.B.
490 SUTTER STREET, ROOM 2315
SAN FRANCISCO, CALIF. 94108
GARFIELD 1-4290

January 3, 1967

Clark P. Polak, Executive Secretary
Homosexual Law Reform Society
34 S. 17th Street
Philadelphia, Pennsylvania

Dear Sir:

This is in reply to your letter of December 7, 1966 requesting an outline of my opinion as a psychiatrist concerning the questions of homosexuality and psychopathology. I am sorry that it is not more prompt.

Firstly, I consider psychopathology to be an unscientific, misleading term. Psychopathology, or mental illness, are metaphors which erroneously correlate diverse problems of human existence with organ maladies such as pulmonary pathology produced by the t.b. bacillus or malfunction of the pancreas which is diabetes. Inappropriate nomenclature leads to improper concepts and operations in any field in which knowledge is involved.

What is called psychopathology is generally not disease or illness of the brain but is correctly understood as difficulty in personal conduct or psychosocial problems. If the individual is sufficiently vexed by his problems, he seeks psychotherapy, an educational engagement whereby he learns to cope with them more adequately. If others are concerned by his conduct, they often seek to have him segregated under duress rather than attempt non-coercive means of modifying his thoughts or behavior. But a basic value of a free society is freedom for every one who doesn't injure any one else. And the values of a society are directly reflected

in its psychiatry as well as in its laws. (For an exposition of this theory see the writings of Thomas S. Szasz, Professor of Psychiatry at Syracuse University who is its leading exponent.)

Secondly, in reference to the term, psychopathic personality, and the specific case you are helping to appeal, there is, as the case citations indicate, general agreement among psychiatrists that this is an ambiguous attempt at categorization. It should not be included in the phrase, "afflicted with psychopathic personality, epilepsy or mental defect," the latter two designations having definite medical or psychological standards of diagnosis.

Thirdly, I think that homosexuality, or more precisely homoerotic inclination, is a process of vicissitude in some individuals and of almost infinite variability within the human species. Because of the long history of sanctions and persecution in western society, a person with this tendency will continually encounter difficulties related to it. At one extreme, some may become "hung up in this bag," or obsessed with it; at the other end of the spectrum, some may develop full supression or sublimation.

The early life of one with a homoerotic disposition was probably impaired in some manner. But it is not infrequent that individuals with adverse nurturing or constitution transcend their handicaps to make important contributions to their society. And the strength of a free society is grounded in the opportunity it offers every one including those who fulfill themselves by dissent and deviation. As John Stuart Mill noted, stringent conformity produced the deterioration of the ancient and advanced culture of China,

Homosexuality is a condition of existence for some human beings, derived mainly from the attitudes towards love and sex in which they were reared. Today, perhaps

for the first time in two thousand years, in this century among free people, there has begun the endeavor by social scientists and leaders in religion and the arts to consider it openly and honestly. Only by continuing this understanding in accord with the values to which we are committed, as with the many other problems with which we are confronted, can we truly evolve as an affluent nation.

/s/ Ralph B. Elias, M.D.
Psychiatry

UNIVERSITY OF LOUISVILLE
LOUISVILLE, KENTUCKY 40202

SCHOOL OF MEDICINE
DEPARTMENT OF ANATOMY

501 WEST CHESTNUT STREET

December 21, 1966

Mr. Clark P. Polak
Executive Secretary
Homosexual Law Reform Society
of America
Suite 206, 34 S. 17th St.
Philadelphia, Pennsylvania

Dear Mr. Polak:

I have given your recent letter much consideration and hope I may be of some assistance.

A brief outline regarding some of my general feelings on the relationships of homosexuality and psychopathology is attached. I trust you will find it of some use.

Sincerely,

/s/ Milton Diamond, Ph.D.
Assistant Professor

Enclosure

Homosexuality and Psychopathology

In the classical census of human male sexual behavior by Kinsey, Pomeroy and Martin, the concept that homosexual activity, by itself, provides evidence of a psychopathic personality is materially challenged. This is rightly so since those scientists present evidence that from 40% to 50% of the male population have had homosexual experiences and over 15% prefer this general type of sexual expression to heterosexuality. These same individuals reported upon, however, could not be considered psychopathic on the basis of anything else in their histories and it would seem absurd to consider such a large portion of the population psychopathic due to this one trait.

In seeking a definition of sexual psychopathology, or any psychopathology for that matter, it must be admitted that we cannot depend only on a criteria of frequency of occurrence; individuals who parachute for a hobby may be rare in our society yet wouldn't necessarily be considered psychopathic. Similarly, males with a preponderance of homosexual experiences should not be considered psychopathic just because they don't constitute the majority of males. The crux of a definition might hinge on establishing the existence of a "mental disorder" which invariably is present. Here, too, no evidence exists which supports the notion that a disorder exists unless the fact that homosexuals, having certain sexual preferences, are prima facia considered emotionally and behaviorally disturbed. In truth the evidence may be otherwise since many individuals are disturbed more by societies antagonism to their practices rather than by their own behavior. The majority of homosexuals go unrecognized as such by society since they create no disturbance or manifest other symptoms of "disorder."

In discussing sexuality we have many behavioral characteristics to describe. The category choice of

"homosexual" versus "heterosexual" is arbitrary and only one of many used for descriptive convenience. While in some ways the terms still serve a purpose, it is now recognized that sexual behavior is not stereotyped that easily and that for example, fourteen categories are employed by Kinsey and others to discuss the relative proportion of completed same-sex and opposite-sex contacts. Those individuals, male or feamles, who prefer to have all their sexual contacts with an individual of the same sex, would fall into one of these fourteen categories (which actually represent about 4% of the male and 2% of the female population).

If we choose to discuss the actual sexual practice utilized or preferred i.e. fellatio or anal penetration, or any other category, regardless of sex or partner, these same individuals may assort into completely different groups; even well within the general population. Thus with our arbitrary way of categorizing sex we would be hard put to say that the choice of sex partner is, by itself, indicative of anything psychopathic.

A comment may be appropriate as to the origins of sexual preferences and practices. Kallman (1952) and others have shown that homosexuality must indeed have a genetic component. I (1965, 1967 in press) have shown that an endocrine balance during development might be crucial for adult sexual orientation. Others have shown that ontogenetic experiences may contribute. In none of these studies is there any indication that these influences carry with them socially disturbing concommitant personality or mental disorders. When and if such occurs it must be considered an individual case and treated as such.

Lastly it may be said that societies exist in which almost any sexual practice between consenting adults is condoned and even sanctioned (Ford and Beach, 1951; Mead, 1961). Although these do not necessarily conform

to Judao-Christian morals, in our non-theocratic state, this should be immaterial. It may be further argued that it is when an individual of any behavioral description is thwarted from pursuing his private and strictly personal interests, he may be suspect as a potential danger to society. An overly aggressive heterosexual individual may indeed be more detrimental to society than any homosexual would be.

Milton Diamond, Ph.D.

INSTITUTE
FOR
RATIONAL LIVING
INCORPORATED
a non-profit organization

December 9, 1966

Clark P. Polak
Executive Secretary
Homosexual Law Reform Society
of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

In answer to your letter of December 6th, let me briefly state my position on homosexuality and psychopathology.

1. I do not feel that homosexual behavior in itself is in the least pathological, since the percentage of American males who have some kind of homosexual overt contact at some time during their lives is very large, and may well amount to about 40%.

2. Fixed or exclusive homosexuality in which the individual does not only practice overt homosexual acts from time to time, but also is mainly or only oriented toward members of his own sex, and has great difficulty in having sex relations with members of the opposite sex, may be and often is pathological. This is because in our culture most individuals who are fixed homosexuals are neurotically or psychotically obsessed with homosexual behavior, and have a great fear of engaging in heterosexual acts. Many of them, as well, are quite compulsive in their homosexual behavior.

3. Although a case might be made that all exclusive fixed homosexuals are more or less neurotic, it could also be contended that all exclusive fixed heterosexuals are also neurotic since they are fixated on one kind of sexual behavior, and have great difficulty in engaging flexibly in other kinds of behavior. Actually, neurotic or psychotic behavior includes an unusual degree of ri-

gidity, inflexibility, compulsivity and anxiety, and therefore, both exclusively homosexual and exclusively heterosexual individuals may not necessarily be neurotic or psychotic.

4. It is my opinion as a clinical psychologist, and one who has seen and treated a great many fixed homosexuals in the United States, that the vast majority of them are seriously disturbed individuals, and that they are either neurotic or psychotic. The vast majority, however, does not mean all, and it is also my opinion that there are some, though be it relatively few, fixed homosexuals in this country, who are well adjusted to the state of homosexuality, who are not guilty about it, who are not particularly compulsive, and who are therefore, at most only moderately neurotic.

5. A psychopathic personality usually is a term employed to mean an individual who is not only seriously disturbed, but is disturbed in an antisocial manner, and who is driven by his disturbance to keep committing acts of a criminal or delinquent nature. Although some fixed homosexuals may be justly diagnosed under the heading of this term, it is my firm opinion that most of them could not be so justly labeled. Any law which calls an individual a psychopathic personality merely because he is homosexual in his inclinations and acts is an inaccurately stated law, and I would highly recommend that it be radically changed or eliminated from the statute books.

6. I feel that many of our existing laws against fixed homosexuality are antiquated and unfair in that they unscientifically discriminate against individuals who may at the very worst boastfully be disturbed, but some of whom would be much less neurotic, psychotic, and psychopathic then are a great number of completely heterosexual individuals in our society.

Sincerely yours,

/s/ Albert Ellis, Ph.D.
Executive Director

LOMA LINDA UNIVERSITY

SCHOOL OF MEDICINE
DEPARTMENT OF PSYCHIATRY

LOMA LINDA
CALIFORNIA
9 2 3 5 4

December 12, 1966

Mr. Clark P. Polak
Homosexual Law Reform Society
Philadelphia, Pennsylvania

Dear Mr. Polak:

With regard to the case of Boutilier vs. Immigration and Naturalization Service, I am ignorant of the legal formalities involved in an amicus brief, and will therefore simply give you my views regarding homosexuality and psychopathology.

The diagnostic label psychopathic personality has long been considered inadequate, and was replaced by the term sociopathic personality in the 1952 revision of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Use of the term sociopathic personality, which emphasizes the social nature of the problem, is now widespread, but the concept remains basically the same. Whether called psychopathic or sociopathic, the cardinal characteristics of such individuals are usually considered to include an inability to learn from experience, impulsive antisocial acts, and absence of feelings of social responsibility. The APA manual continues to classify sexual deviations, including homosexuality, under the general category of sociopathic personality disturbances; nevertheless, few psychiatrists or psychologists consider sexual deviates to be necessarily sociopathic in any sense other than that their sexual behavior often (but not always) has social implications. Two major writers who specifically say sexual deviations should not be classified as sociopathic disturbances are H. Cleckly ("Psychopathic

States," in S. Arieti (Ed.), American Handbook of Psychiatry, New York, Basic Books, 1959) and N. Cameron (Personality Development and Psychopathology, Boston, Houghton Mifflin Co., 1963)

For the past two years I have been doing research at the University of Southern California School of Medicine involving personality-somatotype-hormone patterns in homosexual vs. heterosexual males. Data are still being gathered and no formal findings are available at this time, but in my judgment, homosexuality does not necessarily involve psychopathology. There are homosexual individuals who can properly be called sociopathic (based on irresponsibility, impulsiveness, lack of regard for others), but it has nothing to do with their homosexuality as such. The designation psychopathic or sociopathic personality implies nothing regarding form of sexual expression; likewise, the designation homosexual does not connote any particular personality or character formation. Homosexuals are extremely heterogeneous, with virtually nothing in common except the matter of attraction to members of their own sex. In terms of socialization, they range from virtual lack to highly developed sense of responsibility. It is grossly inaccurate to confound psychopathic or sociopathic characteristics with sexual preferences.

Sincerely yours,

/s/ Ray B. Evans, Ph.D.
Assistant Professor Psychiatry

INDIANA UNIVERSITY
INSTITUTE FOR SEX RESEARCH, INC.
Founded by Alfred C. Kinsey
JORDAN HALL 318 / BLOOMINGTON, INDIANA 47401 / AREA CODE 812 TEL. NO. 337-3525

Trustees
Paul H. Gebhard
Cornelia V. Christenson
John H. Gagnon
William Simon
Theodore W. Torrey

December 14, 1966

Mr. Clark P. Polak
Homosexual Law Reform Society
of America
34 South 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

This letter is in reply to your communication of December 6 wherein you ask for the collective opinion of the members of the Institute for Sex Research on the connection between homosexuality and psychopathology.

Our opinion, based upon extensive interviewing and other data, is as follows. Certain expressions of homosexuality may be symptoms of pathology, just as certain heterosexual activities may be indicative of emotional disturbance. However, homosexuality is not a pathology in itself nor necessarily a symptom of some other pathology.

Sincerely yours,

/s/ Paul H. Gebhard
Director

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98105

School of Medicine
Department of Psychiatry

December 9, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 South 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

In reference to your recent letter in which you asked me to outline my views on the justification for equating homosexuality and psychopathic personality, my views are, briefly, as follows: The older term "psychopathic personality" has as you know been supplanted, in official nosology, by the term antisocial reaction. Both of these terms are still used interchangeably by psychiatrists to refer specifically to a group of chronically antisocial individuals "who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic showing marked emotional immaturity, with a lack of sense of responsibility, lack of judgment and an ability to rationalize their behavior so that it appears warranted, reasonable and justified" (quoted from the A.P.A. Diagnostic and Statistical Manual of Mental Disorders).

I know of no knowledgeable and thoughtful psychiatrist who would automatically categorize a homosexual person as a "psychopathic personality" ("antisocial reaction"). This mixup does occur in legal thinking, however, and to some extent we psychiatrists may have contributed to it inasmuch as the Diagnostic and Statistical Manual still continues to lump sexual deviation, antisocial reaction, addiction and alcoholism under the general heading of "Sociopathic Personality Disturbance." The terms socio-

path and psy opath sound so much alike that the confusion is compounded. The truth, of course, is that just as some alcoholics may be "psychopathic personalities" ("antisocial reaction") so too some homosexual persons may be "psychopathic personalities." But in neither case does this constitute a very large percentage of the total. My point is that when law views all homosexuals as "psychopathic personalities" it is guilty of using faulty logic. It is the same order of faulty logic as saying "alcoholism occurs in businessmen therefore all businessmen are alcoholic."

Contemporary psychiatry sees homosexuality as having several origins (see reprint enclosed). In some instances it is an expression of a serious underlying mental illness such as schizophrenia, but in most instances the homosexual life-style is the product of certain complex early learning influences and should not be thought of as a "mental illness" or "psychopathology" in the traditional sense of that term. Whether society approves, disapproves, tolerates, or sanctions homosexuality is quite a separate issue which behavioral science is not directly concerned with (though behavioral scientists as individuals do have opinions about).

I would, of course, venture no opinion on the person involved in the litigation you mentioned, except to say that if he were truly an "antisocial personality" (psychopath), as I defined earlier, I would, as a citizen, not favor his immigration. But this is an entirely separate matter from that of his homosexual life-style.

I trust this answers the questions raised by your letter.

Sincerely yours,

/s/ John L. Hampson, M.D.
Associate Professor of
Psychiatry

Enclosure

ZOO ZÜRICH SCHWEIZ · SUISSE · SWITZERLAND
DIREKTION TEL. 051 24 33 11 POSTCHECK 80 - 1818

December 13, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania USA

Dear Sir,

I suppose that you wrote me on 6th December, 1966 owing to the fact of my collaboration at the book "Sex and Behavior", edited by Frank A. Beach, published by John Wiley & Sons, Inc., New York, London, Sydney — 1965. This collaboration was the result of the participation at a two-stage-conference on Sex and Behavior in Berkeley for which I had been invited by the US National Academy. With regard to my research work on comparative behavior I have also to study comparative sex problems for what I am in touch with medical men and psychiatrists.

My opinion is that it is not right to declare that a homosexual is a psychopathic personality. I think that homosexuals can exist without having also psychopathic traits.

The United States Immigration and Naturalization Service should also remember that homosexuality cannot be inheritable contrary to dispositions of psychopathic diseases.

May I add that, as far as I know, homosexuality cannot be the reason for deportation in Switzerland.

Yours sincerely,

/s/ H. Hediger
Professor

OREGON STATE UNIVERSITY CORVALLIS, OREGON 97331
SCHOOL OF HOME ECONOMICS

December 22, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

I am responding to your letter of December 6th in which you ask that I outline my "position in reference to the question of homosexuality and psychopathology."

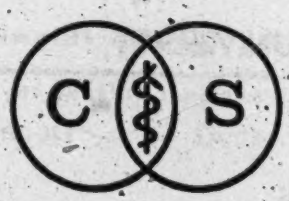
The assumption that homosexuality is ipso facto the same as a "psychopathic personality" is definitely unwarranted. In my work I have known and worked with a number of homosexuals (and here again precision in definition is needed, for people are found whose total sexual expression is homosexual, to those whose sexual experiencds are confined only partially to homosexuality). In a legal proceedings, definitions would need to be arrived at with care.

But even when one's sexual expression is totally homosexual that individual may function effectively in his personal, business and social relations and be as normal so far as personality attributes and behavior is concerned as those who are heterosexual.

Just as heterosexuality cannot be automatically equated with healthy personalities, so is it impossible to equate homosexuality with "psychopathic personality."

Sincerely yours,

/s/ Lester A. Kirkendall
Professor of Family Life



CEDARS-SINAI MEDICAL CENTER

Reply to
8720 BEVERLY BOULEVARD
LOS ANGELES, CALIFORNIA 90048

Telephone: 652-5000
Area Code 213

December 14, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17 Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

The following excerpts from the introduction to my book on "Sexual Inversion: The Mutliple Roots of Homosexuality" may be pertinent to the case of the alien Canadian whom the United States Immigration and Naturalization Service is attempting to deport on the grounds that his homosexuality makes him ipso facto a "psychopathic personality:"

> "Hooker's findings, justify the conclusion that sexual deviance in itself does not necessarily mean social maladjustment. Although exclusively homosexual behavior does — as most psychoanalysts argue — reflect a functional limitation in the capacity for heterosexuality, the possibility must be granted that under certain circumstances this limitation may not necessarily interfere with reasonably satisfactory life adjustment. If the judgments of psychoanalysts about heterosexuals were based only on those they see as patients, would they not have the same skew impression of heterosexuals as a group?"

"The assumption that homosexuals are all alike is a stereotype born of cultural prejudice, the absurdity of which becomes obvious if compared to the corresponding assumption that heterosexuals are all alike. . . . I am not denying that the spectrum of personality distribution in homosexuals tends to be more heavily weighted toward neurotic patterns of behavior than is that of heterosexuals. This is inevitable in a society that makes such behavior ipso facto, maladaptive. . . . Therefore, individuals who adopt such deviant behavior in our society are statistically more likely to feel inadequate and to show evidences of less adequate ego formation. Granting all this, there is, nevertheless, as wide a personality variation among homosexuals as among heterosexuals: from extremely passive to extremely aggressive ones; from quiet introverts to loud and raucous extroverts; from hysterics to compulsives; from sexually inhibited and timid types to sexually promiscuous and self-flaunting ones; from irresponsible sociopaths to highly responsible and law-abiding citizens. Their psychiatric diagnoses, apart from the homosexual symptom, run the entire gamut of modern nosology."

In short, I would strongly emphasize that current scientific evidence shows no justification for classifying homosexuals automatically as psychopathic personalities. To do so is a clear indication of stereotyping based on social prejudice and not on scientific evidence.

Very truly yours,

/s/ Judd Marmor, M.D.
Director
Divisions of Psychiatry

MARGARET MEAD
15 WEST 77TH STREET
NEW YORK 24, N. Y.

December 23, 1966

Mr. Clark P. Polak
Executive Secretary
The Homosexual Law Reform
Society of America
34 South 17th Street
Philadelphia, Pa. 19103

Dear Mr. Polak:

In regard to your query of December 7th, 1966 asking for my position on the question of whether homosexuality per se constituted pathology, I refer you to the following paragraphs:

> The cross-cultural and cross-species comparisons presented in this chapter combine to suggest that a biological tendency for inversion of sexual behavior is inherent in most if not all mammals including the human species. At the same time we have seen that homosexual behavior is never the predominant type of sexual activity for adults in any society or in any animal species.
>
> Some homosexual behavior occurs in a great many human societies. It tends to be more common in adolescence than in adulthood and appears to be practiced more frequently by men than by women. This is also true of the other animal species with which this chapter deals, and particularly so in the infrahuman primates.
>
> The basic mammalian capacity for sexual inversion tends to be obscured in societies like our own which forbid such behavior and classify it as unnatural. Among these peoples social forces that impinge upon the developing personality from earliest childhood tend to inhibit and discourage ho-

> mosexual arousal and behavior, and to condition the individual exclusively to heterosexual stimuli. Even in societies which severely restrict homosexual tendencies, however, some individuals do exhibit homosexual behavior. In our own society, for example, homosexual behavior is more common than the cultural ideals and rules seem to indicate. Within the societies which, unlike our own, provide socially acceptable homosexual roles, a number of individuals, predominantly men, choose to exhibit some measure of homosexual behavior.

taken from PATTERNS OF SEXUAL BEHAVIOR, by Clellan S. Ford, Ph.D. and Frank A. Beach, Ph.D. with a foreword by Robert Latou Dickenson, M.D., page 143.

I enclose a Xerox copy of the page in question. I regard this as the most firmly based, best statement on the subject, as it represents sound biological research and extensive cross-cultural research.

Sincerely yours,

/s/ Margaret Mead

Enclosure (2)

PATTERNS OF SEXUAL BEHAVIOR

by CLELLAN S. FORD, *Ph.D.*
Associate Professor of Anthropology, Yale University

and FRANK A. BEACH, *Ph.D.*
Professor of Psychology, Yale University

WITH A FOREWORD BY
ROBERT LATOU DICKINSON, M.D.

HARPER & BROTHERS, PUBLISHERS
and
PAUL B. HOEBER, INC., MEDICAL BOOKS

does not belong under the general rubric of homosexuality. This is the relationship that occurs when a male and female engage in coital performance, but each one takes the role of the opposite sex. Hamilton has described an encounter between two monkeys which illustrates such double inversion. A large female approached a younger and smaller male and, apparently because of her aggressive bearing, the male assumed the feminine coital posture. The female mounted the male in masculine fashion, but dismounted almost at once and offered herself to the male who promptly copulated in the normal manner. It is not at all uncommon to observe the temporary display of masculine behavior on the part of receptive females confronted with sexually sluggish males. Female dogs, rats, and other animals in heat may mount the male repeatedly if he is slow to assume the initiative in the sexual relationship. Often this stimulation suffices to evoke more vigorous behavior on the male's part.

Summary

The cross-cultural and cross-species comparisons presented in this chapter combine to suggest that a biological tendency for inversion of sexual behavior is inherent in most if not all mammals including the human species. At the same time we have seen that homosexual behavior is never the predominant type of sexual activity for adults in any society or in any animal species.

Some homosexual behavior occurs in a great many human societies. It tends to be more common in adolescence than in adulthood and appears to be practiced more frequently by men than by women. This is also true of the other animal species with which this chapter deals, and particularly so in the infrahuman primates.

The basic mammalian capacity for sexual inversion tends to be obscured in societies like our own which forbid such behavior and classify it as unnatural. Among these peoples social forces that impinge upon the developing personality from earliest childhood tend to inhibit and discourage homosexual arousal and behavior, and to condition the individual exclusively to heterosexual stimuli. Even in societies which severely restrict homosexual tendencies, however, some individuals do exhibit homosexual behavior. In our own society, for example, homosexual behavior is more common than the cultural ideals and rules seem to indicate. Within the societies which, unlike our own, provide socially acceptable homosexual roles, a number of individuals, predominantly men, choose to exhibit some measure of homosexual behavior.

INSTITUTE OF PSYCHIATRY

UNIVERSITY OF LONDON
DIVISION POSTGRADUATE MEDICAL FEDERATION

THE MAUDSLEY HOSPITAL
DENMARK HILL
LONDON S.E.5.
RODNEY 6133

December 20, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
37 South 17th Street
Philadelphia, Pennsylvania 19103, U.S.A.

Dear Mr. Polak,

Thank you for your letter of 7th December.

I am not sure that my personal views are necessarily likely to be of help to you.

It is my opinion that homosexuality may or may not co-exist in the same individual with mental illness. The fact that a person has a loving sexual relation with a member of the same sex does not imply that they need exhibit any other form of personality disorder, mental illness, or psychopathy. It is not uncommon for such an individual to be a talented, even distinguished member of society and one who shows integrity and reliability in his relations with others. Such a person is, of course, as likely or as unlikely to come into conflict with the law as a practicing heterosexual, that is - the rest of society.

Having said this, however, I think it should be stated that, in clinical practice, people with homosexual problems are often unhappy and likely to be disturbed in other respects. I mean by this, and I think it generally true, that if a patient has a major sexual difficulty, it is likely that other areas of the personality will be involved.

I do not imagine that data from biology and animal behaviour would be admissible. But it is true to say that homosexual behaviour occurs spontaneiously in all the primates that have been studied as well as in a wide range of infra-primate mannals. If one takes the view that Man, in his evoluation, is not distinct and separate, this behaviour would be a predicted variation in human beings also.

Yours sincerely,

/s/ Richard P. Michael
Senior Lecturer in Psychiatry,
Institute of Psychiatry,
University of London.
Honorary Consultant Physician,
Bethlem Royal and Maudsley
Hospitals.
Director, Primate Research Centre.

THE JOHNS HOPKINS MEDICAL INSTITUTIONS
THE JOHNS HOPKINS UNIVERSITY SCHOOL OF MEDICINE • THE JOHNS HOPKINS HOSPITAL

OFFICE OF PSYCHOHORMONAL RESEARCH
Departments of Psychiatry & Pediatrics
The Johns Hopkins University
School of Medicine

Reply to: Phipps 409
The Johns Hopkins Hospital
Baltimore, Maryland 21205
Phone: 301/955-3760

December 19, 1966

Mr. Clark P. Polak
Executive Secretary
Homosexual Law Reform Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

In response to your letter of December 6, concerning the question of homosexuality and psychopathology, you will find the enclosed reprint, Factors in the Genesis of Homosexuality, of pertinent relevance.

It is possible, by examining various rare medical syndromes, to show that homosexuality and psychopathology are independent entities. Take, for example, the syndrome of testicular feminization. Individuals with this condition have the visible structure and appearance of females. They do not menstruate and cannot conceive, but they can and do have sexual intercourse as a female. Instead of having ovaries, they have two testicles. Their internal reproductive organs are male, not female. Genetically, they have the XY, male chromosome complement, not the XX of the female. These people marry as females. The husband is therefore in the position of having sexual relations with a wife who has two testicles and is a genetic male. Genetically and gonadally, the pair are in a homosexual partnership, though on the criterior of external sexual organs they are not. Typically there is never an issue of psychopathology. The husband is not accused of being a psychopath because he has a sexual relationship which is genetically and gonadally homosexual; nor is the wife.

Another similarly instructive syndrome is that of congenital virilizing adrenal hyperplasia in a female, so extreme in its degree of virilization that a genetic female baby is born with a completely normal-looking penis instead of female external sex organs. Consider the case of such a baby who grows up as a boy and marries as a man. Genetically, this person is female and has two ovaries and female interval organs, but the appearance of the body as it develops is masculine. The marriage partner is a normal female. Would this wife or husband be considered psychopaths because their marital relationship is genetically and gonadally homosexual? The answer is no.

Now, a very tricky, complementary issue is presented if you imagine the patient just described being sexually attracted to a man instead of a wife. Both partners then would have a penis and so, on that criterian, would be in a homosexual relationship. But on the genetic and gonadal criterian, they would be not homosexual but heterosexual, since the patient has two ovaries and the XX chromosomes of the female. Would either of them be considered psychopathic because they both had a penis? I rather doubt it. Most people would allow the chromosomal and gonadal heterosexuality to be an extenuating circumstance, and dismiss the psychopathic accusation.

I have examined the above two test cases to demonstrate that homosexuality per se does not automatically qualify as a psychopathic trait.

It is quite another question as to whether people who are ordinarily considered to be homosexual are also psychopaths by reason of exhibiting a second symptom of psychopathology or psychopathic personality. The answer here is perfectly clear: homosexuality as a matter either of psychosexual identity (obligative homosexuality) or of transient opportunism in an otherwise heterosexual person (facultative homosexuality) can occur totally independently of other psychologic symptoms.

Whether the latter are present or not is a matter of individual diagnosis, case by case.

When they do coexist with homosexuality, these other symptoms are not of any specific variety. They are not particularly likely to be symptoms of that special antisocial, sociopathic type that are subsumed under the technical term "psychopathic personality."

I do not think that society is psychopathically endangered if a homosexual is permitted to immigrate. In fact, the very reverse could be true, insofar as many extraordinarily accomplished people in all walks of life, who have much to contribute to the nation's advancement, would be excluded if all homosexuals are, de facto, excluded as psychopathic.

Sincerely yours,

John Money, Ph.D.
Associate Professor of Medical
Psychology and Pediatrics

LEONARD B. OLINGER, PH.D.
468 NORTH BEDFORD DRIVE
BEVERLY HILLS, CALIFORNIA 90210
CRESTVIEW 6-2278

DIPLOMATE IN CLINICAL PSYCHOLOGY
AMERICAN BOARD OF EXAMINERS IN PROFESSIONAL PSYCHOLOGY

December 12, 1966

Clark P. Polak, Esq.,
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak,

Thank you for your letter of 6 December, in which you acquaint me with the case currently before the US Supreme Court. As you may know, issues of this kind periodically turn up, and expert testimony then is requested regarding the question of homosexuality and psychopathology.

There are those who still espouse the notion that was born and nurtured during the era of pre-scientific thinking, to the effect that homosexuality is a specific disease entity, and, as such, is psychopathological. Persons championing this position most frequently, when pressed for evidence to support their position, offer "proof by assertion", or resort to the authority of the Bible or legal statutes, even if circular reasoning thereby results. More psychodynamically-oriented clinicians have always known that the equation is not a proven (and probably not even a justified) one, but these voices have often been lost in a whisper when confronted with the gale of terror-engendered choruses of the ignorant and the frightened. The tendency to regard homosexuality as an illness or pathology per se was unfortunately reinforced by the same kind of thinking that permitted masturbation to be conceived of as leading to mental illness; in both cases, there was an association between the phenomena and the setting where they were viewed: Persons seeing mental

patients masturbating, out of boredom or for any other, of a variety of reasons, in mad houses or neuro-psychiatric hospitals, could naively assume that the one was the cause of the other. This same primitive logic system (Post hoc, ergo propter hoc = After this, therefore because of this) led many uncritical observers to assume that since the first studied homosexuals were ones who had run afoul of the law or had been encountered in hospitals (even though countless ones managed to function outside of hospitals and jails), all such persons must be ill, and all such illness derives from the pre-existing (or mistakenly assumed) conditions.

It was with much gratification, then, that the researches of persons such as Dr. Evelyn Hooker (400 South Saltair Avenue, Los Angeles, California 90049), of whom you may have heard, were received by those of us who needed more systematic study of matched groups of homosexuals and heterosexuals. I believe you will find that she has data bearing very much on the point of whether psychopathology and homosexuality may in fact be so easily equated. It goes without saying that such studies indicate that homosexuality may exist in the absence of psychopathology, and that there is room for both health and/or psychopathology in persons with a heterosexual orientation. It may still be a matter of opinion (since all opinion is something that is somewhere between ignorance and fact), but the kind of evidence which rigorously-conducted studies and investigations (such as Doctor Hooker's, who is a Research Associate at UCLA) offers, might hopefully be accepted by the Court as better grounded. Perhaps you should get in touch with her.

Sincerely,

/s/ Leonard B. Olinger, Ph.D.
State-Certified Clinical Psychologist — CP 1550

NORMAN REIDER, M.D.
2380 Sutter Street
San Francisco 15, California

December 10, 1966

Mr. Clark Polak
Executive Secretary
H. L. R. Society
34 South 17th St.
Philadelphia, Pa.

Dear Mr. Polak:

Forgive me for writing you a reply to your letter of December 7, instead of having it typed. I am leaving on a trip and have to send it to you this way; otherwise it would be too late for your purpose.

I support your amicus brief in regard to the action to deport a homosexual for the following reasons:

(1) Homosexuality per se is no evidence of psychopathology. There are many many instances of heterosexuality wherein heterosexuality is based on more psychopathology than one sees in some homosexuals.

(2) To relegate by definition homosexuality ino the category of "psychopathic personality" has been for years a convenient dispositional device by armed services, courts and diagnostic centers. This practice is falling away by all scientifically-minded workers in the field as evasive, unscientific and discriminatory.

(3) Homosexuals can be as honest, courageous, contributory to society and as trustworthy as a heterosexual. The Federal law is unfair that it lends itself to the use of labels which can be used capriciously; the law should be in operational terms and not in diagnostic ones.

Sincerely,

/s/ Norman Reider

Established 1932
Sexology
An Authoritative Guide to Sex Education
MAGAZINE
154 WEST 14TH STREET
NEW YORK, N. Y. 10011
212 ALGONQUIN 5-7755

December 14, 1966

Mr. Clark P. Polak
Homosexual Law Reform Society
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

It is my professional opinion that any attempt to classify an individual as a "psychopathic personality" purely on the basis of the fact of his homosexuality is both grossly unjust and highly unscientific. Although there are sharp differences of opinion among psychiatric and psychological specialists concerning the etiology of homosexual behavior, there is considerable agreement that homosexuality is not a clinical entity and is therefore found in the most diverse kinds of persons.

Although individuals with severe emotional maladjustment and criminal behavior are found among homosexuals (as among heterosexuals), there are also found many socially useful and able citizens among them, in all walks of life and professions including members of the clergy. A number of them are making highly significant contributions to the social and cultural life of our country; in past history, some emerged as intellectual or cultural leaders of eminence. Thus, to deny persons otherwise qualified as citizens the privilege of citizenship on the basis of homosexual behavior per se is to deprive our nation of important human resources as well as to commit an injustice against them.

As editor of a magazine specializing in sexual matters and as an officer of the Sex Information and Educa-

tion Council of the U.S., Inc. and author of the latter's study guide on homosexuality, I have followed recent empirical research in the field of homosexuality with some care. It has become increasingly evident from carefully controlled studies that past thinking, which identified homosexuality and severe pathology, was based on inadequate and distorted samples consisting of prison populations or of psychiatric patients. Some of these recent studies have found that -- at least in the groups studied -- severe emotional maladjustment was not more prevalent among homosexuals than among comparable heterosexual groups. Whether these studies can be generalized to the entire homosexual population is not established by present knowledge, nor is it at issue in the present case. What is at issue is whether any of the homosexuals studied could be characterized as stable, constructive and socially useful persons, or whether all of them had necessarily to be characterized as psychopathic.

I can find no scientific evidence to support the belief that all homosexuals are necessarily psychopathic and that therefore we have no choice but to consider each case individually and upon its own merits.

Sincerely yours,

/s/ Isadore Rubin, Ph.D.
Editor, Sexology Magazine

DR. HENDRIK M. RUITENBEEK
48 FIFTH AVENUE
NEW YORK 3, N. Y.

December 15, 1966

To Whom It May Concern:

It is my firm and considerate opinion that there is no link between homosexuality and psychopathology. Homosexuality is a variety of the whole complex of sexual behavior. Sigmund Freud and Magnus Hirschfeld both believed that homosexuality was not an illness and I feel I am in good company with the two people just mentioned.

That some homosexuals might be neurotic or psychotic does not prove the link between homosexuality and psychopathology. Many of my heterosexual patients are either neurotic or psychotic, but that does not mean that there is a link between heterosexuality and psychopathology.

Cordially yours,

/s/ Dr. Hendrik M. Ruitenbeek

COMMISSION on
UNDERGRADUATE
EDUCATION in the
BIOLOGICAL SCIENCES
1717 MASSACHUSETTS AVE., N.W., SUITE 403
WASHINGTON, D.C. 20036 / 202-232-1166

December 20, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

I have reviewed your letter of December 7 very carefully. From my analysis of the circumstances, I don't believe that opinions based on my professional experience and expertise would contribute support to either side of the question (which the Homosexual Law Reform Society of America is attempting to clarify) concerning homosexuality and psychopathology.

From my own work with domestic animals, I know that homosexuality among cattle is quite commonplace and indeed is frequently the rule. In chickens, turkeys and Japanese quail, such behavior is not uncommon and certainly not considered pathological. However, I have never worked with humans and so cannot extrapolate my findings to human social situations.

You would be well advised to seek counsel from persons whose professional experience includes analysis of the basic problems involved, both in psychic areas as well as physical growth and development. Some authority in the field of mammalian development and endocrinology would have opinions that would be more significant and scientifically valid than my own.

I am sorry that I can't be more helpful.

Sincerely yours,

/s/ Martin W. Schein

BIRKBECK COLLEGE, UNIVERSITY OF LONDON
RESEARCH PROJECT, OPINION

Please reply to:
28 LYNDHURST GARDENS
LONDON, N.W.3

December 12, 1966

The Homosexual Law Reform Society,
34, S. 17th Street,
Philadelphia, Pennsylvania 19103. U.S.A.

Dear Sirs,

I write, not as a medical man, but as a social psychologist who has carried out a long and detailed research on behalf of the British Home Office and Birkbeck College of the University of London. The results of this research are reported in detail in a book entitled: THE SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY.

The main conclusion of this research is that homosexuality is a condition which in itself has only minor effects upon the development of the personality. The idea that homosexuality is pathological is incorrect; this mistaken idea has arisen because in the past studies of homosexuals in clinics and prisons have shown that many of them are neurotic. But in fact most homosexuals do not seek treatment and do not get into trouble with the law. A study of those who have not been under treatment or arrest shows that homosexuality is not a pathological condition.

Yours faithfully,

/s/ Michael Schofield

THOMAS S. SZASZ, M. D.
750 EAST ADAMS STREET
SYRACUSE, NEW YORK 13210

TELEPHONE: 472-5630

December 19, 1966

Mr. Clark P. Polak
Executive Secretary
Janus Society of America
34 South 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

In accordance with your request of December 6, I summarize below my opinion on the relation between homosexuality and psychopathology. You may use this, as you deem fit, in support of your defense of the case mentioned in your letter.

In my judgment, "psychopathology" — or "mental illness" — is a highly misleading term. It is not, as commonly supposed, an illness, in any ordinary sense; instead, it is the name for some types of behavior. What kinds of behavior are categorized as "sick" is arbitrary in exactly the same sense as it is arbitrary to categorize one religion as "true" and all others as "false," or one skin color as "superior" and all others as "inferior."

Accordingly, whether homosexuality is "pathological" is wholly a matter of definition. It is important to note, however, that Sigmund Freud, on whose work so much of contemporary American psychiatric thought and practice rests, stated emphatically that homosexuality is not a disease. In his famous letter to a mother who wrote to him about her homosexual son, he said [1935]: "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness. . . . It is a great injustice to persecute homosexuality as a crime, and cruelty, too."

I share Freud's foregoing opinion. In my judgment, homosexuality is neither a bodily disease, nor a mental illness, nor a symptom or manifestation of "psychopathic personality."

For a more detailed exposition and documentation of my views on this subject, please see the following of my publications:

"The Ethics of Birth Control," The Humanist, 20: 332-336, 1960) (Copy enclosed.)

The Myth of Mental Illness (New York: Hoeber-Harper, 1961) (English edition, 1962; Italian edition, 1966).

Law, Liberty, and Psychiatry (New York: Macmillan, 1963)

"Psychiatry as Ideology," in The Rationalist Annual (England) 1965, pp. 43-52. (Copy enclosed.)

"Legal and Moral Aspects of Homosexuality," in Judd Marmor, ed., Sexual Inversion (New York: Basic Books, 1965), pp: 124-139. (Copy enclosed.)

"Mental Illness is a Myth," The New York Times Magazine, pp. 30 & 90-92. (Copy enclosed.)

Sincerely yours,

/s/ Thomas S. Szasz, M.D.

Ernest van den Haag
52 West 9th Street
New York 11, N. Y.
GRamercy 7-7585

December 11, 1966

Mr. Clark P. Polak
Janus Society of America
34 S. 17th Street
Philadelphia, Pennsylvania 19103

Dear Mr. Polak:

I refer to your letter of December 6th.

It is my opinion that, for various reasons, the incidence of various personality disorders among homosexuals might well be greater than among heterosexuals. One reason might be the social ostracism to which homosexuals are subjected. However there is no reason to assume, and no evidence to prove, that homosexuals per se suffer necessarily from abnormalities, or that homosexuality is itself a disease. Specifically, I find no reasons any no evidence to assume that homosexuals have a "psycho-pathological" personality.

The evidence also indicates that a great number of homosexuals have led, and are capable of leading, useful and creative lives, maintaining peaceful relationships with their fellow citizens.

A number of experts in psycho-pathlogy, beginning with Sigmund Freud, hold the view that I share. My view, in this regard, has been expressed in some detail in "The Problem of Homosexuality in Modern Society", edited by Hendrik M. Ruitenbeek, Published by Dutton, 1963.

Sincerely yours,

/s/ Ernest van den Haag
Adjunct Professor in Social Philosophy, New York University; Lecturer in Psychology and Sociology, New School for Social Research

APPENDIX E

A STUDY AID

Prepared by the Committee on Religious Concerns of the Mattachine Society of Washington

IS HOMOSEXUALITY A SICKNESS?
A Compendium of Informed Opinion in the Negative

* * *

"I would like to say that I could tell the reader in a few words the nature, cause and cure of homosexuality. It would then be superfluous for him to read any other book on the subject. I am sorry that I cannot do this. We all seem to be as far from being able to do this as we are from expounding the nature, cause and cure of heterosexuality or of love — or indeed of life and the universe itself with all its manifold phenomena. Indeed, the latter task may seem to be as near to, or as far from solution as the former."

Dr. Charles Berg, F.B.P.s.S., D.P.M.
Co-Author of The Problem of Homosexuality, 1958

This pamphlet is a representative, but by no means exhaustive compilation of professional and authoritative commentary opposed to the concept of homosexuality as a sickness, disturbance, or other pathology.

The following quotations have been somewhat hurriedly arranged during the month preceding the January 7, 1966 meeting of the Special Needs Sub-Committee of the

Department of Ministry, Vocation and Pastoral Services of The National Council of Churches of Christ in the U.S.A.

The Committee on Religious Concerns,
The Mattachine Society of Washington

P.O. Box 1032
Washington, D.C. 20013

- - - - - - - - -

DR. J. H. KAHN
Johns Hopkins Medical School

"Homosexuals are not sexual curiousities, anomalies, NOR ALWAYS IN CONFLICT WITH THEMSELVES. Those who are in distress need the help which others require, who are in the same degree of emotional turmoil."

DR. ROBERT LINDNER
Author of: Handbook of Correctional Psychology, Contemporary Criminal Hygiene, Explorations in Psychoanalysis, Rebel Without A Cause, The Fifty Minute Hour, and Must You Conform?

"Within the last few decades the idea that homosexuality is an illness, a mental disease, an abnormality of behavior falling within the provice of psycho-pathology, has gained broad acceptance. During the recent war, when psychiatry and clinical psychology surged to prominence, this notion took hold. Today, many of my colleagues in these fields have abandoned that naive view, modified it, or tend toward the conceptions I have outlined in these pages . . . Declaring the homosexual mentally ill, therefore, brings him within the compass of this regressive view and the range of all the "therapies" devised to insure his conformity. It may masquerade as a boon to the invert and a humanitarian modification of

historic prejudice and hate: it is, in fact, but another way to obtain the conformance — this time in the area of sex-behavior — our dangerously petrifying institutions demand."

DR. CLARENCE A. TRIPP (Ph.D.)
Clinical Instructor at the Downstate Medical Center (Brooklyn, New York)

"Notions that homosexuality is unnatural and sick — and that its so-called cure would always be desirable, are still held by some professionals, and the lay public in general. Issues of sickness are made seemingly more valid in the eyes of clinicians by the fact that they so consistently see a sample of the population where homosexual tendencies are associated with severe guilt, conflict, or other neurotic disturbances. . . . As for psychotherapy, I know of not one single validated instance of any basic sexual change ever having been accomplished. Nor was the Kinsey Research ever able to find a single instance of any such change. Nor does the issue seem to be of the least importance. Even if there were treatment procedures for successfully revising an individual's whole personal value system, would we be ready to apply those procedures . . . to those millions of persons who are primarily homosexual for their entire lives?"

DR. GEORGE WEINBERG (Ph.D.)
Author of many articles on psychology and statistics, as well as a textbook, Statistics: An Intuitive Approach, and the soon to be released Personality Change. Dr. Weinberg is a psychotherapist in private practice in New York City. He is a former professor at New York University and Hunter College. Dr. Weinberg spoke at the 1965 ECHO Conference and took a strong anti-sickness stand, in which he told homosexuals about the dangers of Psychoanalysis. He said:

"Some homosexuals seeking cures have very dominating analysts and they are actually afraid to admit to their anlysts that they have not been cured."

DR. ISADORE RUBIN (Ph.D.)
Managing Editor of Sexology Magazine

"Unless there is a place for the homosexual in the Great Society there will never be a great society in any meaningful sense. . . . The body of evidence which says that homosexuality is not a sickness has grown to a point where it can no longer be ignored. . . . The Journal of the American Medical Association continues to disregard studies proving that homosexuality is not an illness . . . We cannot create a great society while condemning millions of our fellow citizens."

DR. E. M. MARSH
Gynecologist (San Francisco)

"Doctors should take the scientific and biological view, in which no sexual activity is 'un-natural' if they want to do their patients the most good . . . The theologian makes a moral judgment based on the traditional Judeo-Christian code of behavior; the sociologist asks what's best for the greatest number; the lawyer asks what's legal. The physician should make no judgment apart from that which has to do with the physical and mental health of his patient. Doctors are as poorly educated about sex and as much in the dark as other people. Still, they are the ones most often asked for advice about it."

DR. WARDELL B. POMEROY
Co-Author of the Kinsey Research findings

"Yes, times are changing. There is a real opportunity for the Mattachine Society to play a role during this period of flux. It will not accomplish this role as long as its members believe the nonsense that society has been

saying for the past 150 years, or as long as they are weighed down by feelings of low self-esteem induced by society's attitude toward them. When you (homosexuals) are called nuts and neurotics and goofers by therapists, immoral by the clergy, criminals by lawyers and judges, and perverts and child seducers by the public, you need a special kind of faith in yourself and faith in your fellow man before the collective ego of the Mattachine Socity can be healthy and effective."

DRS. DESMOND CURRAN AND J. WHITBY
(from the British Medical Journal — September 14, 1957)

"For the patient who is adjusted to being homosexual much less is possible; no doctor could produce for the Wolfenden Committee a "cured" case of complete homosexuality."

DR. SIGMUND FREUD
Founder of Psychoanalysis

"Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, IT CANNOT BE CLASSIFIED AS AN ILLNESS; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.) It is a great injustice to persecute homosexuality as a crime, and cruelty too."

DRS. KINSEY, POMEROY AND MARTIN
(Excerpts from Sexual Behavior in the Human Male. Baltimore: W. B. Saunders, 1948.

"The homosexual has been a significant part of human sexual activity ever since the dawn of history, primarily because it is an expression of capacities that are basic in the human animal. . . . The evidence which we now

have on the incidence and frequency of homosexual activity indicates that at least a third of the male population would have to be isolated from the rest of the community, if all those with any homosexual capacities were to be so treated. . . . It is argued that an individual who is so obtuse to social reactions as to continue his homosexual activity and make it any material portion of his life, therein evidences some social incapacity; but psychiatrists and clinicians in general might very well reexamine their justification for demanding that all persons conform to particular patterns of behavior. . . . As a matter of fact there is an increasing proportion of the most skilled psychiatrists who make no attempt to re-direct (homosexual) behavior, but who devote their attention to helping an individual accept himself, and to conduct himself in such a manner that he does not come into open conflict with society."

DR. ERNEST VAN DEN HAAG (Ph.D.)
Psychoanalyst, Sociologist, and Professor of Sociology at New York University and Professor of Sociology at the New School.

"It seems quite doubtful that homosexuality is a disease. . . Homosexual behavior often is a symptom or part of illness; so is heterosexual behavior. (I am reminded of a colleague who reiterated" all my homosexual patients are quite sick" — to which I finally replied "so are all my heterosexual patients." As our culture has absorbed analysis, analysts have become culture-bound. It seems a questionable gain). . . . Many homosexuals are neurotic or psychotic and seek the help of analysts, as do many heterosexuals. It does not follow that homosexuality itself is an illness — that it is always associated with clinical symptoms (other than the sexual choice itself) of disturbance. . . . I do not believe that homosexuality as such can or need be treated. But the sicknesses of homosexuals, in which homosexual-

ity plays a part, require treatment as do those of heterosexuals. . . . Homosexuality, therefore, is as natural as heterosexuality."

REPORT OF THE (WOLFENDEN) COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION. London: Presented by Command of Her Majesty, Queen Elizabeth.

"But we feel bound to say that the evidence put before us has not established to our satisfaction the proposition that homosexuality is a disease. . . . Our evidence suggests, however, that homosexuality does not satisfy any of them (the three criteria for a condition to be recognized as a disease) unless the terms in which they are defined are expanded beyond what could reasonably be regarded as legitimate. . . . Many people behave in an unusual, extraordinary or socially unacceptable way, but it seems to us that it would be rash to assume that unorthodox behavior is necessarily symptomatic of disease if it is the only symptom that can be demonstrated. . . . On the criterion of symptoms, however, homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects. . . . Our medical evidence seems to show three things: first, that in general practice male homosexuals form a very small fraction of the doctor's patients; secondly, that in psychiatric practice male homosexuality is a primary problem in a very small proportion of the cases seen; and thirdly, that only a very small percentage of homosexuals consult doctors about their condition."

DRS. DESMOND CURRAN (Consultant Psychiatrist and Member of the Wolfenden Committee) and DENNIS PARR (Dept. of Psychiatry, St. George's Hospital, London) The following are conclusions of both doctors based upon a study of 100 homosexuals:

"In our series, both practicing and non-practicing homosexuals were on the whole successful and valuable members of society, quite unlike the popular conception of such persons as vicious, criminal, effete, or depraved. We found no reason to regard most of the patients as physically, intellectually, or emotionally immature (unless the basic criterion for 'immaturity' is that of being a homosexual — a circular argument.) Only half of the patients showed significant psychiatric abnormality other than their sexual deviation, and such associated abnormalities were often slight. MOREVER, MANY OF THESE ABNORMALITIES WERE EXPLICABLE AS A REACTION TO THE DIFFICULTIES OF BEING HOMOSEXUAL. If homosexuality is a disease (as has often been suggested) it is in a vast number of cases MONOSYMPTOMATIC (having only a single symptom), NONPROGRESSIVE, AND COMPATIBLE WITH SUBJECTIVE WELL-BEING AND OBJECTIVE EFFICIENCY."

DR. HARRY BENJAMIN
Psychiatrist, Author

"If adjustment is necessary, it should be made primarily with regard to the position of the homosexual in present day society and society should more often be the patient to be treated than the invert.

" 'Must the individual homosexual be rejected in our time?' That such a question should even be asked makes me feel a bit ashamed. At least that was my first reaction. With similar justification we could ask whether a left-handed or a color-blind person should be rejected. All of these people exist, and they exist by no fault of their own. Quite naturally they should not be rejected. . . . As I see it, homosexuality can have a wide variety of reasons and motivations. Homosexuality is to be considered a symptom due to numerous underlying causes and not a fixed entity like a disease. It can hardly be called unnatural, being often a product of nature."

DR. BLANCHE M. BAKER
Psychiatrist, Writer

"I regard homosexualisim as a way of life and not a disease in any sense. I agree with the late Dr. Alfred Kinsey that homosexuality is one of our mammalian heritages appearing widespread in the general population as a matter of individual variation."

DR. J. A. HADFIELD
Lecturer on Psychopathology and Mental Hygiene at the University of London.

"I no longer take homosexuals on for treatment, for the number of cases any one analyst can treat is limited. The process of cure . . . cannot be considered a practical answer to the widespread incidence of homosexuality."

DR. D. STANLEY-JONES
Royal Society of Medicine -- Symposium on Homosexuality.

"Any course of therapy which seeks to reverse the fundamental pattern (homosexual orientation) is not only fore-doomed to failure, as all the reported cases testify, but is also quite indefensible when regarded in the light of absolute morality: attempted treatment or alteration of the basic personality (of a homosexual) can only be described as a moral outrage."

DRS. FRED H. BROWN (Clinical Psychologist at the Mt. Sinai Hospital) AND RUDOLF T. KEMPTON (Chairman, Department of Zoology, Vassar College)

"In order to understand inversion we must cease to view it as a disease. The homosexual or invert becpmes a problem for the psychologist because he does not fit into any clear niche in our society. . . . Sexual inversion is not a disease, but a consequence of biologic or psy-

chologic factors or a combination of both. . . . Psychological treatment has enabled individuals to make a better emotional adjustment to their homosexual wishes with reduction of such symtoms of nervous strain as already described."

RUTH BENEDICT
Famous Anthropologist, Author of Patterns of Culture
Columbia University

"Western Civilization tends to regard even a mild homosexual as an abnormal. The clinical picture of homosexuality stresses the neuroses and psychoses to which it gives rise, and emphasizes almost equally the inadequate functioning of the invert and his behavior. We have only to turn to other cultures, however, to realize that homosexuals have BY NO MEANS BEEN INADEQUATE TO THE SOCIAL SITUATION. THEY HAVE NOT ALWAYS FAILED TO FUNCTION. In some societies they have been especially acclaimed. . . . When the homosexual response is regarded as a perversion, however, the invert is immediately exposed to all the conflicts to which aberrants are always exposed. His guilt, his sense of inadequacy, his failures, are consequences of the disrepute which social tradition visits upon him, and few people can achieve a satisfactory life unsupported by the standards of their society. The adjustments that society demands WOULD STRAIN ANY MAN'S VITALITY, and the consequences of this conflict we identify with their homosexuality."

DR. med WOLFGANG E. BREDTSCHNEIDER
German Board of Psychiatry and Neurology

"The much used term 'against nature' is utterly ridiculous and cannot stand up against scientific or reasonable analysis, as long as such analysis is able to keep itself free from bias . . . Homoerotic behavior has always been, is, and will remain in all likelihood. Why

fight against it constantly? Why deny its actual existence? Why not, instead, render it useful for the sake of all?"

DR. DONALD JAMES WEST, M.B., D.P.M.

"Homosexual behavior seems to arise from some deep-rooted natural urge which finds different expression in different cultures. . . . such propensities are a part of man's natural biological inheritance. In our culture such tendencies are suppressed."

DR. CHARLES BERG, F.B.P.s.S., D.P.M.
Consultant Psychologist to the British Hospital for Functional Nervous Disorders, and late Physician to the Tavistock Clinic and the Institute for the Scientific Treatment of Delinquency. Author of many well-known books.

"Homosexuality is not a disease, nor even a clinical entity. It is nothing more than a particular form of expression, of a psychic state which is common to all living creatures. . . . In the light of what we know of psychology, this does not warrant the heterosexual feeling superior to the homosexual, or regarding him as somebody to whom he can teach better ways. . . . Like any human action, homosexuality — like heterosexuality — means something different in each individual."

DR. JOSEPH STEIN
Author of Maturity in Sex and Marriage, 1963

"To perceive it (homosexuality) as an unnatural deviation, an illness, and, therefore, as a perversion of the sexual instinct, is to lose sight of the fact that the social dictate does not reflect biology. . . . It would be very difficult to establish the existence of an exclusively HETEROSEXUAL instinct on the human level. There is considerable reason to think that if left to his own devices, modern man might not be so predominantely heterosexual, certainly not exclusively so."

DR. EVELYN HOOKER
The University of California, Author of Extensive Research Papers on Homosexuality

"What are the psychological implications of the hypothesis that homosexuality is not necessarily a symptom of pathology? I would, VERY TENTATIVELY suggest the following:

1. Homosexuality as a clinical entity does not exist. Its forms are as varied as heterosexuality.
2. Homosexuality may be a deviation in sexual pattern which is within the normal range, psychologically. This has been suggested on a biological level by Ford and Beach.
3. The role of particular forms of sexual desire and expression in personality structure and development may be less important than has frequently been assumed."

DRS. KURT HILLER, FRANZ REINHARD AND JUERGEN ROGGENHAUSEN, Germany

"We declare that love between those of the same sex, however incomprehensible, absurd, or even abhorrant it is to the feelings of normal people, is neither a vice nor a disease; it is not a mockery of nature but a manifestation of nature; it is an erotic variation that has been observed amongst all peoples of the earth since the dawn of human thought."

DR. VON KRAFFT-EBBING

"That contrary sexual sensation cannot thus be necessarily regarded as psychical degeneration, or even as a manifestation of disease, is shown by various considerations . . . It has become impossible to maintain in this connection the idea of 'disease'." — From New Studies in the Domain of Homosexuality.

DR. IWAN BLOCH
Author of The Sexual Life of Our Times

"I have observed a great number of homosexuals belonging to all ages and occupations in whom not the slightest trace of morbidity was to be detected. They were just as healthy and normal as heterosexuals. . . For me, there is no longer any doubt that homosexuality is compatible with complete mental and physical health."

DR. EUGENE DE SAVITSCH

"Homosexuals . . . probably constitute anything from 5 to 10 percent of our population, and in the majority of cases are no more responsible for their condition than is a brunette for her hair or a Negro for his skin . . . There is no germ, so far as we know, that makes an individual seek a member of his own sex . . . These people (well-adjusted homosexuals) should, in my opinion, keep as far as possible from the medical profession, except when suffering from appendicitis, pneumonia, or some organic ailment, the treatment of which will not upset their psychological balance."

DRS. CLELLAN S. FORD AND FRANK A. BEACH
(Dr. Ford is Professor of Anthropoligy, Yale University and Dr. Beach is Professor of Psychology, Yale University. They are authors of Patterns of Sexual Behavior.)

"Human homosexuality is the product of the fundamental mammalian heritage of general sexual responsiveness as modified under the impact of experience . . . The cross-cultural and cross species comparisons presented in this chapter combine to suggest that a biological tendency for inversion of sexual behavior is inherent in most if not all mammals including the human species."

DR. FRANK A. BEACH
Professor of Psychology, Yale

"People who say that homosexual activities are biologically abnormal are wrong. . . .We find ourselves then, agreeing with Gide in his contention that homosexual behavior should be classified as natural from the evolutionary and physiological point of view."

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A RECOMMENDED READING LIST

If you are unable to locate any of the books on the following reading list, the Committee on Religious Concerns of the Mattachine Society of Washington will gladly assist you. Write:

The Mattachine Society of
Washington
P.O. Box 1032
Washington, D.C. 20013

Bailey, D.S., Homosexuality and the Western Christian Tradition, London: Longmans, Green and Co., 1955

Benson, R.O.D., In Defense of Homosexuality, Julian Press, Inc. New York, 1965

*Cory, D.W., The Homosexual in America, New York: Greenberg, 1951

Cory, D.W. Ed., Homosexuality — A Cross Cultural Approach, New York: Julian Press, 1956

Ford, C.S., and Beach, F.A., Patterns of Sexual Behavior, Chap. VII New York: Harper and Hoeber, 1951

*Heron, A. (Ed.) Toward a Quaker View of Sex. London: Friends Home Service Committee, 1963

Hooker, E.A., A Preliminary Analysis of Group Behavior of Homosexuals, Journal of Psychiatry, 42: 217-225, 1956

Hooker, E.A., The Adjustment of the Male Overt Homosexual, Journal of Projective Techniques, 21: 18-31, 1957

Kinsey, A.C., et al., Sexual Behavior in the Human Male. Baltimore: W.B. Saunders, 1948, and Kinsey, A.C. et al., Sexual Behavior in the Human Female. Baltimore: W. B. Saunders, 1953

*Kuhn, D., (Ed.) The Church and the Homosexual, Glide Urban Center, 330 Ellis Street, San Francisco, California 94102

*Ruitenbeek, H. M., (Ed.) The Problem of Homosexuality in Modern Society. New York: Dutton, 1963

*Wolfenden, J., Report of the Committee on Homosexual Offenses and Prostitution. London: Her Majesty's Stationery Office, 1957. Published in U.S. by Stein and Day, 1963

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*Indicates that this book is available in a paperback edition.

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SUPREME COURT, U. S.

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Supreme Court of the United States

JANUARY TERM, 1967

No. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

—against—

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Statement of Question Presented

1. Is the term "afflicted with psychopathic personality" so vague when construed to encompass consensual homosexual activity as to deprive petitioner of liberty without due process of law?

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Supreme Court of the United States

JANUARY TERM, 1967

No. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

—against—

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, are organizations dedicated to the protection of individual rights guaranteed by our Constitution.

The case at bar presents novel and difficult questions concerning the constitutionally protected right of a person "to be informed as to what the state commands or forbids."[1]

This brief is submitted in the belief that this case provides an opportunity for the Court to clarify the intimate nexus which exists between the procedural safeguards guaranteed by the Fifth Amendment, such as the privilege against self-incrimination, and the government's obligation

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[1] *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939) at p. 453.

to define with reasonable clarity the nature of proscribed substantive conduct.

In addition, this brief is submitted in the belief that this Court should consider the vital question of the application of deportation statutes to conduct which does not endanger the public safety. Where conduct, like that in which petitioner was engaged, is private and consensual, without any act of aggression towards the community, no interest of the state is threatened.

The written consent of the parties to this *amicus* appearance has been obtained and filed with the Clerk of the Court.

Statute Involved

The statute involved is set forth as an Appendix to this Brief.

Introduction

Clive Michael Boutilier, an alien permanently residing in the United States for over ten years, has been ordered to leave this country because he was "afflicted with psychopathic personality" at the time of his entry on June 22, 1955, in that he had engaged in consensual homosexual activities between the ages of 14 and 32.

The Immigration and Naturalization Service predicates its deportation order upon the premise that evidence of homosexual activity is sufficient to establish the affliction "with psychopathic personality" which renders an alien excludable and hence subject to summary deportation at any time. *Immigration and Nationality Act of 1952*, 66 Stat. 163; Title 8, U. S. Code Section 212(a)(4) and Section 241(a)(1) [8 U. S. Code §1182 and §1251(a)(6)].

It is the government's contention that Congress intended the statutory term "psychopathic personality" to include within its purview all manifestations of homosexual activity. If the term "psychopathic personality" is construed in this manner, it is so vague as to give little or no guidance as to the scope of its proscription and, therefore, any punishment meted out to Boutilier thereunder deprives him of his liberty without affording him the constitutionally required warning that his conduct was proscribed. E.g., *Connolly, Commissioner* v. *General Construction Company*, 269 U. S. 385 (1926); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964).

The issue, therefore, is whether the statutory term "afflicted with psychopathic personality" is sufficiently definite to provide adequate guidance that all homosexual conduct falls within its purview.

ARGUMENT

I.

The term "psychopathic personality" is so vague when construed to cover consensual homosexual activity as to deprive petitioner of his right to due process of law under the Fifth Amendment.

1. The term "psychopathic personality" afforded no warning to Boutilier that consensual homosexual activity is a deportable offense.

The void for vagueness doctrine takes as one of its basic tenets that no man should suffer at the hands of the state as a result of conduct which he could not reasonably understand to be proscribed. See, Amsterdam, *The Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. Law Rev. 67 (1960); *Bouie* v. *City of Columbia*, 378 U. S. 347

(1964). Thus, before punishment may be meted out under a statute, the statutory language must afford reasonable warning of the scope of its proscription. This Court held in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951), that, although the "void for vagueness" doctrine ordinarily arises in the context of criminal prosecutions, it is fully applicable to deportation statutes. The Court, however, in *DeGeorge* determined that the phrase there at issue, "crime involving moral turpitude", had acquired a sufficiently definite meaning through 60 years of judicial construction, until there was reasonable certainty that it would encompass the conduct then before the Court.

In contrast to the phrase at issue in *DeGeorge*, neither the courts nor the medical profession have construed the term "psychopathic personality" to include consensual homosexual conduct.

In *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey County*, 205 Minn. 545, 287 N. W. 297 (1939), aff'd 309 U. S. 270 (1940), a Minnesota statute authorized the involuntary committal of persons proven to be of a "psychopathic personality". The Supreme Court of Minnesota, in upholding the constitutionality of the statute, construed the term as follows:

> "... the language of ... the act is intended to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every

person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined."

The United States Supreme Court held that it was bound by Minnesota's construction of the statute and, when limited to those persons whose uncontrollable sexual impulses created a danger of physical harm to others, the term "psychopathic personality" was not so vague as to be unconstitutional.

In holding that the statute could not be applied to "every person guilty of sexual misconduct", the Court in *Pearson* unequivocally suggested that "psychopathic personality" could not constitutionally be construed to encompass irregular and consensual homosexual activity, the type for which Boutilier now faces deportation. Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1958).

In *Mutual Life Insurance Company of New York* v. *Frost*, 164 F. 2d 542 (1st Cir., 1947), the court was called upon to determine whether an insured qualified for insurance disability payments. The court quoted medical testimony to the effect that one manifestation of a "constitutional psychopathic personality" was an inability to cope with a hostile environment created by one's own blunders. The picture of Boutilier which emerges from his psychiatrists' reports is far from that of a person unable to cope with a hostile environment. Dr. Edward F. Falsey, a psychiatrist whom Boutilier consulted in 1964, reported:

"Evidently of good intelligence, this patient is working steadily as a building maintenance man for Kenilworth Company at 161 East 42nd Street. Earlier, he served at [sic] attendant and companion to a man who was mentally ill and the patient performed responsibly in the role of companion." Exhibit 6; Transcript of Record, p. 13.

Dr. Montague Ullman, Director of Psychiatric Services at Maimonides Hospital of Brooklyn, whom Boutilier consulted in 1965, stated:

"Mr. Boutilier has made a good work adjustment in this country. He has held his current job for three years as a maintenance worker with a copper concern. He is well liked, conscientious about his work and concerned with doing a very good job." Exhibit 7; Transcript of Record, p. 15.

Certainly, his conduct would not seem to a reasonable man to fall within the criteria of "psychopathic personality" enunciated in *Frost, supra.*

In *United States* v. *Gill,* 204 F. 2d 740 (7th Cir., 1953), a "psychopathic personality" was defined as:

". . . an unstable personality, with a tendency to episodic conflicts with the environment, which can occur in a violent manner, and which repeat themselves periodically all during a person's life."

Again, this definition could not have afforded any warning to Boutilier, whose conduct never exhibited the slightest tendency to violence, that his irregular and consensual homosexual activities might brand him as a "psychopathic

personality". See also, *O'Beirene* v. *Overholser*, 193 F. Supp. 652 (D. D. C., 1961).

No single construction of the term "psychopathic personality" emerges from these few judicial attempts at definition. What does emerge quite clearly, however, is the conclusion that Boutilier's conduct would not have been included under any of them. In contrast to *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951), the reported judicial constructions of the phrase afforded no warning that Boutilier's conduct was conclusive evidence of a "psychopathic personality".

If we turn from a legal to a medical context, we again find that no coherent definition of "psychopathic personality" is apparent.[2] What is apparent, however, is a general consensus that irregular and consensual homosexual activity will not justify a diagnosis of "psychopathic per-

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[2] "Psychopathic personality . . . is considered by many to be a meaningless designation. . . ." Noyes, *Modern Clinical Psychiatry*, 3rd Ed. 1941, p. 410.

"The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran & Mallinson, *Psychopathic Personality*, 90 J. Mental Sci., 266 (1944), at p. 278.

"At present, the diagnosis of a psychopathic personality is practically meaningless." Guttmacher: *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time, in Current Problems in Psychiatric Diagnosis* (Hoch & Zubin Ed. 1953), 139, 154.

". . . consensus is impossible in the no-man's land of psychopathic personality." Tappan, *Sexual Offenses and Treatment of Sexual Offenders in the United States, in Sexual Offenses*, 500, 507 (Radzinowics Ed. 1957).

See also, Note, *Exclusion of Aliens as Psychopaths*, 68 Yale L. J. 935 (1959).

The United States Public Health Service, which now contends that "psychopathic personality" includes all forms of homosexual

sonality". *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 677 (n. 14) (9th Cir., 1962), remanded on other grounds, 374 U. S. 449 (1963).

Notwithstanding the fact that neither the courts nor the medical profession had ever defined "psychopathic personality" in a manner which would encompass irregular and consensual homosexual activity, the government contends that the legislative history of the phrase makes it clear that Congress intended it as a "term of art", encompassing all forms of sexual deviation.[3] *Quiroz* v. *Neelly*, 291 F. 2d 906 (5th Cir., 1961); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (2nd Cir., 1956).

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activity, itself considered the term vague and indefinite, stating in 1952:

> "Although the term psychopathic personality is vague and indefinite, no more appropriate expression can be suggested at this time." *Report of Public Health Service on the Medical Aspects of H.R. 2379*, in H.R. Rep. No. 1365, 82nd Cong. 2nd Sess. 46-47 (1952).

The General Counsel of the Immigration Service, in his report to Congress on the term "aliens afflicted with a psychopathic personality" (File No. 56190/113—Comments on S. 3455) (on file in Supreme Court Library) stated:

> "The drafters of the bill are attempting to clarify the meaning of the latter term in the 1917 Act [constitutional psychopathic inferiority] by the use of a more modern expression. The 1917 term has given rise to many difficulties in the past because it is vague and does not describe a condition which is easily susceptible of definition or diagnosis. The Service has some doubt that the new term 'psychopathic personality' used in this bill will prove any more readily susceptible of application than the term in the 1917 Act."

[3] If that is what Congress actually intended, it is unfortunate that a more descriptive phrase such as "sexual deviate" was not utilized. In fact, in 1965, Congress amended Section 212(a)(4) to include "sexual deviation" as a ground for exclusion. The ease with which the proscribed activity was capable of description makes it all the more regrettable that adequate draftsmanship was not utilized in 1952.

Of course, if the phrase "psychopathic personality" is unconstitutionally vague, reliance upon precise legislative history cannot cure the constitutional defect. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir., 1962), remanded on other grounds, 374 U. S. 449 (1963); *United States* v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *Spector*, 343 U. S. 169 (1952). For Congress to ascribe an unexpected meaning to a phrase which had never before borne such meaning is an exercise in legislative cryptography, connoting one set of meanings to the public at large, but another infinitely broader set of meanings, to the favored few having access to the statute's legislative history. Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1958).

In *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), this Court condemned as void for vagueness an interpretation of South Carolina's trespass statute which gave to the words of that statute a meaning which a reasonable man could not have been expected to anticipate. The action of the Federal government in ascribing to the statutory phrase "psychopathic personality" a meaning so broad that a reasonable man could not by consulting judicial or medical definitions have been expected to anticipate it, must be equally repugnant to the Constitution.

The principle enunciated in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), that

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." [306 U. S. at 453]

has been reaffirmed by this Court in the recent cases of *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Bouie* v. *City of*

Columbia, 378 U. S. 347 (1964); *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278 (1961); and *Baggett* v. *Bullitt*, 377 U. S. 360 (1964). Today, more than ever, in a complex and often bewildering society, the state must be required to define with reasonable precision the burdens and responsibilities placed upon its subjects.

2. The term "psychopathic personality" affords no adequate standard to guide governmental officials in their application of the statute.

A second basic tenet of the void for vagueness doctrine is that no government official may be vested with overbroad discretion to determine whether or not given conduct falls within a penal statute. Such overbroad discretion would not only vest an official with the power to enact law, as opposed to merely administering it, but it also would render adequate judicial review of his conduct all but impossible. *Connolly, Commissioner* v. *General Construction Company*, 269 U. S. 385 (1926).

In *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), this Court recognized that a statute which created offenses so ill-defined that judges and juries in applying the statute could not draw from it adequate standards to guide them would violate the Constitution. See also, *Winters* v. *New York*, 333 U. S. 507 (1948).

The principle that adequate guidance must be afforded to government officials charged with a statute's enforcement is designed to protect against the arbitrary and unequal enforcement of penal statutes. If "psychopathic personality" may be construed to encompass consensual homosexuality, it may also be applied, by individual Immigration officials, to other forms of non-conforming conduct, such as

promiscuity or unemployment. The possibility that government officials may be empowered under this vague phrase to enact their individual code of morality into law is clearly sufficient to establish the unconstitutional vagueness of the phrase at issue.

II.

Boutilier has sustained a direct and particular injury as a result of the vagueness of the statutory term "psychopathic personality".

Although the Court below was troubled by the obvious vagueness problem inherent in the phrase "psychopathic personality", a majority reasoned that since much of the conduct which serves as the basis for Boutilier's deportation occurred prior to his entry into this country, the statute's vagueness could have in no way prejudiced him.

In *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278 (1961), a teacher attacked the provisions of Florida's loyalty oath statute. He swore that he had never participated in any activity mentioned by the oath, but, nevertheless, objected to it on principle. This Court, reversing the Supreme Court of Florida, found that petitioner possessed standing to attack the vagueness of the statute, since he was "immediately in danger of sustaining some direct injury as the result of the statute's enforcement." 368 U. S. at pp. 282-283. Boutilier should likewise possess standing to assert his constitutional objection.

1. Boutilier sustained a direct injury as a result of the statute's vagueness, since post-entry conduct was relied upon in ordering his deportation.

To the extent that his post-entry conduct was relied upon by the government in ordering Boutilier deported, he suffered the classic injury against which the vagueness doctrine is designed to protect, in that conduct which Boutilier could not reasonably have known was proscribed by the Federal government, is being used by it as the basis for his deportation.

The Court below found that post-entry conduct was not a substantial factor in determining Boutilier's deportability. It distinguished *Fleuti v. Rosenberg*, 302 F. 2d 652 (9th Cir., 1962), remanded on other grounds 374 U. S. 449 (1963), on the ground that the examining officer in that case had relied heavily upon post-entry conduct. It seems incredible to suggest, however, that, if Boutilier had lived a life of impeccable conventional morality between 1955 and 1964, the post-entry years, the government would have initiated its deportation proceedings. It would be the purest fiction to suggest that pre-1955 behavior alone motivated the government in ordering Boutilier deported. The reality of the situation, as confirmed by the record below, is that his conduct after entering this country was a major factor in a finding that Boutilier was "afflicted with psychopathic personality".

In the Record of Sworn Statement, dated January 13, 1964 (Transcript of Record, pp. 1-10), Boutilier was interrogated extensively about his conduct in this country. In fact, this examination was divided roughly evenly between Boutilier's pre- and post-entry conduct. The Certification by the Public Health Service on January 20, 1964 that

Boutilier was a "psychopathic personality" was based solely upon this interrogation, and there is absolutely no indication that Boutilier's post-entry behavior was not weighed equally with his pre-entry behavior in determining whether he was "afflicted with psychopathic personality". (See Exhibit 4—Certification of U. S. P. H. S., Transcript of Record, p. 11.)

Finally, the Decision of Special Inquiry Officer, dated August 5, 1965, indicates that Boutilier's post-entry conduct was highly relevant in determining his deportability. The Special Inquiry Officer stated:

> "... if the United States Public Health Service doctors who issued the certificate of January 17, 1964 were to appear in the course of these proceedings for examination, they would testify that [Boutilier] prior to his arrival in 1955 *and subsequent thereto until date* has been a sexual deviate of the homosexual type. ..." (Italics added.)
>
> • • • • •
>
> "... After his entry into the United States on June 22, 1955 he continued to have homosexual relations with other men with about the same frequency as before. For about seven years since his arrival in the United States he shared an apartment with another man of homosexual inclination with whom he also had homosexual relations." (Transcript of Record, pp. 23-24.)

Since (1) Boutilier's interrogation, (2) his certification as a psychopathic personality and (3) the decision of the Special Inquiry Officer as to his deportability all rested heavily upon activities performed after Boutilier's entry into this country, he is being deported as a result of con-

duct which the statute never warned him was forbidden. He, therefore, must possess standing to attack the statute's constitutionality.

2. Boutilier sustained a direct injury as a result of the statute's vagueness, since he was unable to conform his pre-entry conduct to any reasonably ascertainable standard.

Even if Boutilier's post-entry conduct were not a substantial factor in his deportation, he would possess standing to attack the vagueness of this statute because of the adverse effects of the statute's vagueness on his behavior in Canada prior to 1955. Judge Moore, dissenting below, stated:

> "Had [Boutilier] known that sexual deviation at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior so that he could not be considered a deviate at the time of entry. He was young, intelligent, and responsible. While he had engaged in homosexual acts from the age of 16 to the age of 21, he had also had sexual relations with women three or four times during this period.
>
> • • • • • •
>
> "In brief, [Boutilier] has been deported because of the existence at the time of his entry into this country of a psychological condition which he probably would have been able to correct had he had any reasonable warning that the existence of the condition could serve as a basis for exclusion or, still more drastic, for deportation after entry. He received no warning. I agree with the Ninth Circuit that to uphold a deporta-

tion order under these circumstances is repugnant to due process." [Citations omitted.] (Transcript of Record, pp. 32-33.)

In addition to depriving Boutilier of any opportunity to reform prior to his entry into this country, the statute's vagueness lulled him into believing that he was eligible for the benefits of residence and, eventually, citizenship in the United States. Relying upon this notion, Boutilier left his native land and emigrated to this country. Now, more than ten years later, the government informs Boutilier that his reliance was misplaced, and that, in fact, he was never eligible to reside here. At the very least he must possess standing to ask this Court whether the frustration of that reliance by the government deprives him of his constitutional guaranty of due process of law.

3. Boutilier sustained a direct injury as a result of the statute, since his constitutionally guaranteed procedural safeguards were vitiated by the statute's vagueness.

Finally, the vagueness inherent in the statutory phrase "psychopathic personality" not only failed to provide a sufficient yardstick against which Boutilier could measure his substantive conduct, but it also invidiously undercut the rudimentary procedural safeguards which are guaranteed to permanent resident aliens by the Constitution.

(a) *Privilege Against Self-Incrimination*

The information which eventually led to Boutilier's deportation order was voluntarily disclosed by him to the government in connection with his application for citizenship in September 1963, when Boutilier candidly informed

an examiner that he had been arrested on a morals charge (later reduced to simple assault and ultimately dismissed for non-prosecution) in 1959. The examiner relayed this information to his superiors and the investigation resulting in Boutilier's deportation order was launched. At the time Boutilier blurted out this damning information he had no reason to suspect that the exclusionary term "psychopathic personality" would encompass his irregular and consensual homosexual activity. The statute completely failed to warn Boutilier that the facts which he gratuitously revealed to the government might subsequently serve as the basis for governmental sanctions against him. The statute's vagueness, therefore, acted to vitiate Boutilier's constitutionally protected right to refrain from offering incriminating evidence about himself to the government, because the proscribed conduct was so vaguely defined that he could not know that the evidence which he was divulging could be incriminating.

A permanent resident alien possesses the right to invoke the protection of the Fifth Amendment in connection with a deportation proceeding. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1953); *DeLucia* v. *Flagg*, 297 F. 2d 58 (7th Cir., 1961); *Sherman* v. *Hamilton*, 295 F. 2d 516 (1st Cir., 1961), cert. den. 369 U. S. 820 (1962); *Bufalino* v. *Holland*, 277 F. 2d 270 (3rd Cir., 1960); see also, *Kimm* v. *Rosenberg*, 363 U. S. 405, 408 (1960) (dissenting opinion). It is a cruel hoax to assure a permanent resident alien that he need not reveal information which could lead to his deportation, and, at the same time, define the offense punishable by deportation so vaguely that he is unable to ascertain whether information revealed by him might be the basis for deportation. Yet that is precisely the situa-

tion in which Boutilier was placed. His right to claim the privilege against self-incrimination was vitiated because the statute under which he is being deported never even warned him that he was in danger of incrimination.

(b) *Due Notice of Charges*

In addition to vitiating Boutilier's Fifth Amendment right to claim the privilege against self-incrimination, the statute's vagueness deprived him of his constitutional right to receive clear notice of any charges against him which might be the basis for his deportation. In *Hirsch* v. *Immigration and Naturalization Service*, 308 F. 2d 562 (9th Cir., 1962) and *MacLeod* v. *Immigration and Naturalization Service*, 327 F. 2d 453 (9th Cir., 1964), the Courts reaffirmed the right of a permanent resident alien to be fully aware of any charges against him punishable by deportation, so that an adequate defense might be prepared. However, because the statute gave him no warning that his conduct was proscribed, Boutilier was never in a position to ascertain with any clarity the nature of any charges against him until after his interrogation on January 13, 1964. Yet it was precisely this interrogation which was the sole basis of his being branded a "psychopathic personality" by the United States Public Health Service on January 20, 1964. The statute's vagueness, therefore, deprived Boutilier of any opportunity to prepare and present an adequate defense, either legal or medical, at the very hearing which ultimately led to his deportation.

(c) *Right to Reasonable Certainty When Dealing With the Government*

Finally, the statute's vagueness deprived Boutilier of his right, basic to any society based upon free choice, to be reasonably aware of the consequences of any activity involving the state. At the heart of the void for vagueness doctrine is the realization that predictability in one's dealing with the state is one of our most fundamental rights. This element of predictability was wholly lacking in Boutilier's dealing with the government. What commenced in 1963 as a petition for citizenship, terminated in 1964 with an order for deportation. Boutilier was entitled to some statutory warning that his request for a more desirable immigration status could result in his deportation. No such statutory warning was ever afforded.

The emasculation of the procedural safeguards which Boutilier has suffered as a result of the statute's vagueness clearly establishes his standing to challenge its constitutionality.

4. Boutilier has standing to attack the vagueness of the statute as a member of the regulated class.

Since one of the basic purposes of the void for vagueness doctrine is the prevention of statutes so vague in their scope as to constitute a danger of arbitrary and unequal application, Boutilier, as a member of the class subject to the statute's regulation, has standing to question whether the standards contained therein afford adequate guidance to the government officials charged with the statute's enforcement. In addition, the very existence of a deportation statute so vague in its scope inhibits all nonconforming conduct on the part of permanent resident aliens lest their particular conduct trigger the statute's

sanction. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278 (1961). Therefore, Boutilier, as a member of the regulated class must have standing to demand that this inhibiting statute be clarified.

CONCLUSION

The judgment below should be reversed and the order of deportation dismissed.

Respectfully submitted,

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APPENDIX

Statute Involved

The relevant provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163; Title 8 U. S. Code), provide in part:

"Sec. 212(a)(4) [8 U. S. Code §1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.

Sec. 241(a)(1) [8 U. S. Code §1251(a)(1)]

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (R. 29–49) are reported at 363 F. 2d 488. The opinion and order of the Board of Immigration Appeals (R. 27–29) and of the special inquiry officer of the Immigration and Naturalization Service (R. 23–27) are unreported.

JURISDICTION

The judgment of the court of appeals (R. 50) was entered on July 8, 1966. The petition for a writ of certiorari was filed on August 12, 1966, and was granted on November 7, 1966 (R. 51; 385 U.S. 927). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Immigration and Nationality Act that makes aliens "afflicted with psychopathic personality" inadmissible to the United States (and hence deportable) embraces homosexuals.

2. Whether, so construed, the provision is void for vagueness as applied in this case because the finding that petitioner was homosexual was based, in part, upon evidence of his conduct after entry into the United States.

3. Whether the finding that petitioner was homosexual when he entered this country was adequately supported by the evidence.

4. Whether petitioner was required to be personally examined by the Public Health Service physicians who certified that he was "afflicted with psychopathic personality" within the meaning of the Immigration Act.

STATUTES INVOLVED

During the period relevant here, Section 212(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provided in pertinent part:[1]

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *

[1] Section 15(b) of the Act of October 3, 1965 (Public Law 89-236), 79 Stat. 919, amended paragraph (4) of the quoted provision of the 1952 Act by deleting the word "epilepsy" and substituting the words "or sexual deviation." The amendment became effective on December 1, 1965 (79 Stat. 920). See pp. 28-29, *infra*.

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * * *

Section 241(a)(1) of the Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

Sec. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

STATEMENT

On August 5, 1965, following a hearing before a special inquiry officer of the Immigration and Naturalization Service (R. 16–22), petitioner was ordered deported from the United States under Sections 212(a)(4) and 241(a)(1) of the Immigration and Nationality Act of 1952 as an alien who, at the time of entry, was within a class of aliens excludable under then existing law—namely, "[a]liens afflicted with psychopathic personality" (R. 23–27). The finding that petitioner was so afflicted was based on the special inquiry officer's determination (as to which there was no substantial dispute at the hearing) that petitioner was at entry a sexual deviate of the homosexual type. An appeal by petitioner to the Board of Immigration Appeals was dismissed on January 12, 1966 (R. 27–29), and on July 8, 1966, a petition to the United States Court of Appeals for the Second Circuit for review of the Board's order was dismissed, one judge dissenting (R. 29–50).

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1. Petitioner is a 33-year-old alien, a native and citizen of Canada (R. 2, 23, 28). He is unmarried and has no children (R. 2). He was admitted to the United States for permanent residence on June 22, 1955, at the age of 21, and has been in this country continuously since that time except for three brief visits to foreign territory, the longest of which was two weeks (R. 2–3; A.R. 8).[2] He last entered the United States on or about April 25, 1959, following a one-day visit to Canada to attend the funeral of his father (R. 21–22, 28). His mother (also a citizen of Canada), stepfather, and three of his five brothers and sisters reside in the United States (R. 2, 12, 14, 31, 43). One brother and one sister live in Canada (R. 12, 14). At the time of the administrative proceedings, petitioner was employed as a utility man for a copper company in New York City (R. 9, 21).

In September 1963, as part of an application for naturalized American citizenship, petitioner submitted an affidavit to a naturalization examiner acknowledging that on October 2, 1959, he had been arrested in Brooklyn, New York, on a charge of sodomy, "anus and mouth," in violation of Section 690 of the New York Penal Law (R. 32; A.R. 11). The offense was alleged to have been committed by petitioner on a 17-year-old male youth, but the charge, according to the affidavit, had later been changed to simple assault and

[2] "A.R." references are to the numbered tabs of the administrative record before the Immigration and Naturalization Service, which was a part of the record in the court of appeals and a certified copy of which has been lodged with the Clerk of this Court.

subsequently dismissed (A.R. 11). Petitioner acknowledged in the affidavit that he committed the offense, but stated that he had since "ceased to continue homosexuality." Petitioner further stated in the affidavit that he had admitted to his Selective Service Board that he was a homosexual and that the Board had classified him 4–F (A.R. 11).[3]

On the basis of the admissions in this affidavit, petitioner was advised that the government desired additional information from him. Accordingly, on January 13, 1964, petitioner appeared before an investigator of the Immigration and Naturalization Service and gave a second sworn statement, in question-and-answer form (R. 1–10).[4] The statement may be summarized as follows:

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[3] Petitioner attested in the affidavit the free and voluntary character of his statements and that he realized that any statement he made might be used against him as evidence in any proceeding (A.R. 11).

[4] At the opening of the interview petitioner was fully advised of his rights. He was told that any statement made would have to be voluntary, and that it might be used against him as evidence in any proceeding, civil or criminal (R. 1). Petitioner's suggestion, first made in this Court, that the investigator's advice was constitutionally deficient in failing to include a warning as to his right of counsel is misconceived, and his reliance on *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, misplaced (Pet. Br. 5, n. 1). The administrative inquiry in which petitioner's statement was given was not a criminal proceeding. In addition, it was conducted prior to the dates of both of the above decisions (June 22, 1964, and June 13, 1966, respectively). *Johnson* v. *New Jersey*, 384 U.S. 719, of course, held that those decisions were to have prospective application only.

Petitioner's first homosexual experience occurred in Canada when he was 14 years of age, seven or eight years prior to his first entry into the United States. The incident involved attempted anal sodomy, committed on petitioner by a 40-year-old man with whom he shared a bed on a hunting trip (R. 4–5).

Petitioner's next homosexual experience occurred two years later in a public park in Halifax, Nova Scotia. He was then about 16 years old. The act involved was *fellatio,* performed upon petitioner. A second such act occurred shortly afterwards in the same park (R. 5–6). Thereafter, during the period of approximately six years immediately preceding his first entry into the United States, petitioner had homosexual relations in Halifax and Pictou County, Nova Scotia, on an average of three or four times a year. The acts all involved similar incidents of *fellatio* (R. 6). Petitioner also attested that he had had heterosexual relations, prior to his first entry into the United States, on three or four occasions (R. 6).

During the period of approximately eight and one-half years between his admission to the United States for permanent residence in 1955 and the date of his statement, petitioner continued to have homosexual relations on an average of three or four times a year, and since 1959 he had shared an apartment in Brooklyn with a man named O'Rourke with whom he had had homosexual relations two or three times a year. The last homosexual act which (according to his statement) petitioner performed with anyone occurred four months prior to his testifying, in the

apartment of, and with, a man whose name he did not know (R. 7). His relations with O'Rourke, as well as the act last mentioned, had all involved acts of *fellatio* performed upon petitioner (R. 7–8). Petitioner testified that all of his homosexual acts, both in Canada and in the United States, had been voluntary on the part both of him and of the other participant (R. 8).

Referring to the conduct for which he had been arrested in October 1959 (see pp. 4–5, *supra*), petitioner testified that it had consisted of two separate acts—one of anal sodomy committed by petitioner on his teen-age partner, the other of *fellatio,* performed upon petitioner by the same young man (R. 3–4). Asked whether he knew why his Selective Service Board had classified him 4–F in 1957, petitioner replied, "I'm homosexual." He further stated that one of the questions on the Selective Service questionnaire that he had been asked to fill out was whether he was a homosexual, and that he had answered, "Yes" (R. 8–9).

Petitioner's sworn statement was submitted to the United States Public Health Service for its opinion as to whether petitioner was excludable for any medical cause at the time of his 1955 entry. On January 17, 1964, the Public Health Service issued a certificate, signed by Paul G. Smith, M.D., Chief of Psychiatry, and Maria Sarrigiannis, M.D., Medical Director, stating that on the basis of the information contained in the statement it was the opinion of the subscribing physicians that petitioner "was afflicted with a class

A condition, namely psychopathic personality, sexual deviate" at the time of his admission (R. 11).[5]

2. On the basis of the Public Health Service's certificate and the supporting documents, deportation proceedings were instituted against petitioner on January 28, 1965. On March 8 and July 26, 1965, hearings were held before a special inquiry officer at which petitioner was represented by counsel (A.R. 4, pp. 1–10; R. 16–22). At the March 8 hearing (the transcript of which is reproduced in relevant part in the Appendix, *infra*, pp. 57–60) petitioner, through his attorney, conceded his alienage, his Canadian citizenship, and the fact that he had entered the United States on June 22, 1955; but he denied that he had been, at entry, "afflicted with a psychopathic personality, sexual deviate" (App., *infra*, p. 59; A.R. 5). Government counsel presented the certificate of the Public Health Service physicians, the affidavit that petitioner had filed in the naturalization proceedings, and his sworn question-and-answer statement. These materials were received in evidence without objection, subject to defense counsel's reserving the right to cross-examine Dr. Smith (one of the two physicians who had signed the Public Health Service certificate). Government counsel agreed to make Dr. Smith available for cross-examination and noted that he had offered petitioner's attorney the opportunity to present any additional psychiatric reports for submission to Dr. Smith as a basis of possible reconsideration by the

[5] A "Class A" condition, in Public Health Service terminology, is any condition which renders the alien mandatorily excludable under the immigration laws.

Public Health Service physicians of their certificate. Noting, further, that he had previously offered petitioner the opportunity to be personally examined by the Public Health Service, but that petitioner had declined the invitation, government counsel renewed the offer at the hearing (App., *infra*, pp. 59–60). Petitioner's counsel refused to permit petitioner to be examined by the Public Health Service, stating (*id.*, p. 60):

> We will bring in our own medical evidence. He [petitioner] will be examined by our own doctor and we will submit to you [the special inquiry officer] the findings. I will not have him submit to an examination by the Public Health Service.

At the continued hearing on July 26, 1965, petitioner's counsel introduced in evidence written reports by two private psychiatrists, Doctors Edward Falsey and Montague Ullman, dated March 2, 1964, and March 30, 1965, respectively, relating the results of their separate examinations of petitioner with reference to his psychosexual behavior and condition (R. 12–13, 14–16).* Dr. Falsey's report noted that petitioner had "explained quite frankly that he has been homosexual" (R. 12). It concluded in relevant part (R. 13):

> On psychiatric examination of Mr. Boutelier [*sic*], there was no indication of delusional

*Dr. Falsey's report was in the form of a letter to a prior attorney of petitioner's (R. 12–13, 17–18). Dr. Ullman's report was in the form of a memorandum called a "Clinical Abstract" (R. 14–16).

trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity.

Dr. Ullman's report, after referring to (among other things) petitioner's "homosexual contacts," his having "moved in with a homosexual male with whom he remained for about seven years," and his occasional heterosexual experiences (R. 15), concluded (R. 15–16):

> The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the interview was not a picture of a psychopath but that of a dependent, immature young man with a conscience, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that

his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.

I do not believe that Mr. Boutilier is a psychopath.

Petitioner's counsel advised the special inquiry officer that these reports were the only evidentiary materials she desired to submit (R. 18). It was stipulated between counsel that no useful purpose would be served by submitting the reports of Doctors Falsey and Ullman to the Public Health Service physicians for reconsideration of their certificate, or in having the Public Health Service doctors appear at the hearing to testify, since they would in any event testify that at the time of petitioner's arrival in the United States he "was a sexual deviate" and that, under the regulations of the Public Health Service, they were required to certify that petitioner was afflicted with psychopathic personality within the meaning of the regulations (R. 19). The petinent page of the Service's *Manual for the Medical Examination of Aliens,* requiring Service physicians to classify alien applicants for admission "who are diagnosed as sexual deviates" in the legal category "Psychopathic personality," was received in evidence (R. 19; A.R. 14).[1] Petitioner's

[1] The relevant passage (Part II, chap. 6, § A, par. 6) provided (A.R. 14):

6. *Psychopathic personality.*

a. The legal term "psychopathic personality" is equivalent to the medical designation "personality disorder," which may be broadly defined as follows: "These disorders are characterized by developmental defects or pathological trends in the personality structure, with

counsel agreed that there was "no serious contest" as to whether petitioner was a sexual deviate but only as to whether he was a "psychopathic personality" (R. 19). She stated further that "in this case" the sexual deviation involved "is homosexuality" (R. 20).

3. On August 5, 1965, the special inquiry officer, noting that "[n]o serious question" had been raised either by petitioner, his counsel, or the psychiatrists whose reports they had submitted as to petitioner's "sexual deviation" (R. 26), concluded that the charge of deportability contained in the order to show cause had been sustained, and directed petitioner's deportation (R. 23–27). The officer reviewed the legislative history of the pertinent clause of Section 212(a)(4) of the Act, and concluded that "[w]hatever the phrase 'psychopathic personality' might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts" (R. 26).

Petitioner's appeal to the Board of Immigration Appeals was dismissed on January 12, 1966 (R. 27–29). The Board, like the special inquiry officer, noted that "[n]o serious question" had been raised

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minimal subjective anxiety and little or no distress. In most instances, the disorder is manifested by a lifelong pattern of action or behavior (acting out), rather than by mental or emotional symptoms." [Footnote omitted.] An example of such a certificate is Class A, Psychopathic personality, Inadequate personality.

b. Under this legal category will be classified those applicants who are diagnosed as sexual deviates. * * *

The current *Manual*, as a consequence of the Act of October 3, 1965 (see note 1, *supra*, p. 2), directs the classification of sexual deviates in the new specific category "sexual deviation" created by that Act.

as to whether petitioner was a homosexual at the time of his admission for permanent residence (R. 28).

The court of appeals, one judge dissenting, dismissed petitioner's petition for review of the deportation order (R. 29–50). The court noted in its opinion that it was "beyond contest that [petitioner] was a homosexual long before leaving Canada" (R. 41). From a study of the legislative history of the "psychopathic personality" clause of Section 212(a)(4) of the Act, the court concluded that "the clear design of Congress" was, by this clause, "to exclude homosexuals from entry" (R. 36–38, 42).

SUMMARY OF ARGUMENT

I

The legislative history of Section 212(a)(4) of the Immigration and Nationality Act of 1952 demonstrates that the provision making excludable (and hence deportable) aliens "afflicted with psychopathic personality" was intended to embrace homosexuals and other sexual deviates. The early bills provided explicitly for the exclusion of homosexuals and sex perverts. In commenting on one of these bills, the Public Health Service advised Congress that sexual deviates are ordinarily included within the Service's classification "psychopathic personality with pathologic sexuality"; that this classification would specify such types of behavior as homosexuality and sexual perversion; and that, in those instances where the disturbance in sexuality might be difficult to discover, a more obvious disturbance in personality might be apparent which would warrant a classification of

"psychopathic personality or mental defect." In accordance with the Public Health Service's recommendations, the draftsmen of the legislation omitted the specific references to homosexuals and sex perverts contained in the earlier bills and, in the final draft of the legislation, provided for the exclusion of aliens afflicted with "psychopathic personality * * * or a mental defect." The Senate Judiciary Committee explained the omission of specific reference to homosexuals and sex perverts by pointing out that the Public Health Service had "advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts." The Committee thus advised that the "change of nomenclature" was "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." The House Judiciary Committee likewise referred to the Public Health Service's recommendations and indicated that the bill adopted them.

The congressional objective of subsuming sexual deviates under the "psychopathic personality" provision of the 1952 Act is confirmed by the legislative history of the Act of October 3, 1965, § 15(b), 79 Stat. 919, which amended the 1952 Act to make affliction with "sexual deviation" a specific excludable condition. The committee reports of both Houses state unequivocally that the omission from the 1952 Act of a specific provision making homosexuals and sex perverts inadmissible had been in deference to repre-

sentations by the Public Health Service that the term "psychopathic personality" would encompass those classes, and that the purpose of the amendment was merely to "resolve any doubt" about the matter which might be thought to have arisen from *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449.

II

The "psychopathic personality" provision of Section 212(a)(4) is not void for vagueness as applied to homosexuals. Petitioner argues, in reliance on *Fleuti* v. *Rosenberg*, 306 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449, that the provision, if read as embracing homosexuals, is constitutionally deficient in that it failed adequately to warn him that homosexual behavior in this country, by furnishing evidence that he had a condition making him excludable when he entered, could lead to deportation. We challenge this reasoning.

A. The constitutional requirement of fair warning applies to statutes regulating or imposing sanctions upon conduct; it does not apply to an enactment that merely prescribes standards for the admission of aliens. As guides to adjudication, statutes must of course be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly, consistently, and in accordance with the legislative purpose. Here, the legislative history of the provision in question demonstrates that Congress intended to bar homosexuals from immigration. Some statutes have

the additional function of furnishing guidance to individuals as to how they should conduct themselves in order to avoid liability. It is with respect to this function of statutes that the "void for vagueness" principle applies. This principle—that one is entitled to know before one acts what conduct the law forbids or requires—has no application to the present situation. Here, as in *Fleuti*, the statutory ground for expulsion was not the alien's conduct after entry, but his condition at the time of entry. The vagueness doctrine is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities.

B. Even if petitioner had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable condition at the time of entry, he could not object to any lack of clarity in the deportation statute read on its face. Congress may enact grounds of deportation retroactively, and thus render an alien deportable for past conduct which did not entail deportability when it occurred. Congress could, therefore, pass a statute retroactively making homosexual conduct by an alien within the United States a ground for his deportation. This being so, petitioner's argument—that he was entitled to advance notice that homosexual conduct in this country would result in his deportation—necessarily fails.

C. Even if the constitutional requirement of fair warning were applicable to a deportation proceeding

turning on whether the alien was properly admitted to the United States, it would doubtless be less stringent in a case such as this than in one where criminal sanctions were imposed. This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness, and has similarly considered the legislative histories of statutes in rejecting challenges based on that ground. The same approach is appropriate here. So tested, the statute in issue does not exceed permissible bounds.

III

Assuming that a homosexual is deportable even if not proved to be a psychopath in a medical sense, petitioner's remaining contentions—that the evidence of his homosexuality was inadequate and that the law required his personal examination by the Public Health Service before it certified him as "afflicted with psychopathic personality" by reason of his homosexuality—clearly fail.

A. Petitioner's evidentiary argument is a belated effort to inject—for the first time in this Court—a factual question that was not in dispute below. Petitioner's counsel conceded petitioner's homosexuality at the deportation hearing, stating that the only question was whether his homosexuality made him a "psychopathic personality" within the meaning of the statute. The evidence of petitioner's homosexuality, which included his personal acknowledgment of a long history of homosexual behavior spanning the date of his entry, was in fact overwhelming.

B. The deportation proceedings were not defective because the Public Health Service doctors who signed the certificate attesting to petitioner's excludability at entry because of sexual deviation failed to examine him personally—relying, instead, on his sworn admissions of homosexuality. The government expressly offered petitioner, in the deportation proceedings, the opportunity to undergo the Public Health Service examination which he now insists was required. Petitioner declined the invitation. In these circumstances, he can hardly be heard to complain now that the record is deficient in this regard. In addition, while the Act gives entering aliens the right to be examined by the Public Health Service before they can be excluded on medical grounds, it accords no similar right in a deportation proceeding.

ARGUMENT

Petitioner has been ordered deported, under Section 241(a)(1) of the Immigration and Nationality Act of 1952 (p. 3, *supra*), as an alien who at the time of entry was within a class of aliens who were excludable by the law existing at that time. The "entry" involved was petitioner's original entry for permanent residence on June 22, 1955,[9] and the basis of the administrative determination that petitioner was excludable on that date was the provision of Section 212(a)(4) of the Act (pp. 2–3, *supra*) making "[a]liens afflicted with psychopathic personality" inadmissible. Since (as we show in Point III) there is no

[9] Thus, no issue involving the application of Section 241(a)(1) to a re-entry is presented. Compare *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462.

serious question whether petitioner was in fact a homosexual at entry, the principal issues here are whether the administrative officials and the court of appeals correctly construed the term "[a]liens afflicted with psychopathic personality" as applicable to homosexuals (Pet. Br. 21–28) and whether the term, so construed and applied, is constitutionally valid (Pet. Br. 12–21).

I

THE LEGISLATIVE HISTORY OF SECTION 212(a)(4) OF THE IMMIGRATION AND NATIONALITY ACT CLEARLY DEMONSTRATES THAT THE "PSYCHOPATHIC PERSONALITY" PROVISION WAS MEANT TO INCLUDE HOMOSEXUALS AND OTHER SEXUAL DEVIATES

The administrative authorities found in this case that petitioner was a sexual deviate, specifically, a homosexual. They did not find that he was psychopathic in a clinical sense. However, as the Court of Appeals for the Fifth Circuit observed in *Quiroz* v. *Neelly*, 291 F. 2d 906, 907:

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts.[9]

[9] See, also, *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–416 (C.A. 2) (concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D.N.Y.), affirmed *per curiam sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824; *Matter of P———*, 7 I&N Dec. 258, 261–264 (1956). It has never been respondent's position, as petitioner mistakenly asserts (Pet. Br. 15), that the term "psychopathic personality," as used in the statute, "is merely a euphemism for 'homosexual.'" Our position, rather, is that the term *includes* homosexuals. The category clearly encompasses other medical types as well.

A. The term first appeared in the immigration laws in the 1952 Act. Under prior law, the corresponding term had been "persons of constitutional psychopathic inferiority" (Act of February 5, 1917, § 3, 39 Stat. 875, as amended, 8 U.S.C. (1946 ed.) 136(a)). Persons who were certified to be "mentally * * * defective" were also excludable under the existing law (8 U.S.C. (1946 ed.) 136(d)). In 1950, a subcommittee of the Senate Committee on the Judiciary, in a comprehensive study of the immigration laws, reported (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 345):

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. * * *

As a result of this study, S. 3455, 81st Cong., 2d Sess., was introduced in the Senate on April 20, 1950. Section 212(a) of the bill provided in pertinent part:

> Sec. 212. (a) The following classes of aliens shall be excluded from admission into the United States:
>
> (1) Aliens who are idiots, imbeciles, feebleminded, epileptics, or insane;
>
> * * * * * *

(3) Aliens afflicted with psychopathic personality;

* * * * *

(7) Aliens who are homosexuals or sex perverts;

(8) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a mental defect * * *.

S. 716, 82d Cong., 1st Sess., a revised version of S. 3455, introduced on January 29, 1951, was identical with the earlier bill in relevant part. However, when S. 2550, 82d Cong., 2d Sess., a further modification of the predecessor bills, was introduced on January 29, 1952, it provided, in the phraseology later enacted into law:

Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(1) Aliens who are feeble-minded;

(2) Aliens who are insane;

* * * * *

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;

* * * * *

In explanation of the omission of the category "[a]liens who are homosexuals or sex perverts," which had appeared in the predecessor bills, the report of the Senate Judiciary Committee accompanying S. 2550 stated (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9):

Existing law does not specifically provide for the exclusion of homosexuals and sex perverts.

> The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* [Emphasis added.] [10]

Although S. 2550 was not enacted, a materially identical bill—H.R. 5678—was. The House Judiciary Committee report accompanying that bill (H. Rep. No. 1365, 82d Cong., 2d Sess.) referred to the advice of the Public Health Service mentioned in the passage quoted above from Senate Report 1137; reproduced in full the pertinent Public Health Service report (pp. 46–48); and indicated that the committee,

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[10] As petitioner points out (Pet. Br. 22), the report of which the quoted paragraph was a part was a majority report. Four members of the 13-member committee "respectfully disagree[d] with the majority report" and submitted "minority views," in the "hope that S. 2550 [would] not be accepted by the Senate" (S. Rep. No. 1137, 82d Cong., 2d Sess., Part 2, p. 1). Observing that the bill incorporated "hundreds of highly controversial provisions which require much more careful study and consideration by members of the committee than was possible under the circumstances" (*ibid.*), the minority proceeded, in eleven pages, to criticize various provisions of the bill (*id.*, pp. 1–11). At no point, however, did the minority take issue with the provision of the bill in issue here, or intimate any disagreement with the passage of the majority report quoted in the text.

in reporting out H.R. 5678, had (with an immaterial exception) adopted the Public Health Service's recommendations (p. 48).

The Public Health Service, in its report, was commenting on the "medical aspects" of H.R. 2379, 82d Cong., 1st Sess., a companion bill to S. 716. Like S. 716, H.R. 2379 included, as separate excludable categories, "[a]liens afflicted with psychopathic personality," "[a]liens who are homosexuals or sex perverts," and aliens not within either of those classes (or other class specified in the bill) who were certified by the examining physician as having "a mental defect." The Public Health Service recommended that "[a]liens who are homosexuals or sex perverts" be eliminated as a separate specific category, and that the language of the bill be changed to read, in pertinent part, "[a]liens afflicted with psychopathic personality * * * or a mental defect"—the phraseology ultimately enacted. H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 46, 47. The Service indicated in an accompanying explanatory comment (*id.*, pp. 46–47) that while the term "psychopathic personality" was vague and indefinite, no more appropriate expression could be suggested. "The conditions classified within the group of psychopathic personalities," according to the Service,

> are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic

> personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture.

"The latter or sociopathic reactions," the report continued, "are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation." *Id.*, pp. 46–47.

With respect to the provision of the bill specifying sexual perverts and homosexual persons among the aliens to be excluded, the Service commented (*id.*, p. 47):

> In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered in uncovering the homosexual person.

"Ordinarily," the Service further advised (*ibid.*), "persons suffering from disturbances in sexuality are

included within the classification of 'psychopathic personality with pathologic sexuality.' *This classification will specify such types of pathologic behavior as homosexuality* or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect." (Emphasis added.)

Finally, the Service recommended retention of the term "mental defect" in the bill for the reason that, although "broad and sweeping," it provided a safeguard against the admission of aliens with mental disturbances that did not fit into any other category.[11] There was no explicit reference to sex-related defects or disturbances in the Service's further comments under this head. *Id.*, pp. 47–48.

It is apparent from the foregoing summary of the Public Health Service's report that while the Service did not explicitly so state, it believed—and intended to convey to Congress its belief—that the clause "[a]liens afflicted with psychopathic personality * * * or a mental defect" (which the Service was recommending that Congress adopt) would effectively encompass the bill's stated objective of excluding homosexuals and sex perverts from entry, so that the specific category "[a]liens who are homosexuals or sex perverts" could

[11]The Service noted that the phrase bore "no relationship to mental deficiency which is related to the intellectual status of the individual." H. Rep. No. 1365, p. 47.

be eliminated without concern that such individuals would not be covered. That is plainly the sense in which the Senate Judiciary Committee understood the purpose of the Public Health Service's submission (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9, quoted at pp. 21–22, *supra*), and the House Judiciary Committee, in reporting out H.R. 5678 (the bill, as noted, which became the 1952 Act), stated that the Public Health Service's recommendations had "been followed." H. Rep. No. 1365, 82d Cong., 2d Sess., p. 48.

The legislative history thus establishes, first, that Congress in the 1952 Act intended to exclude from this country all homosexual aliens (as well as sexual deviates of other types) and, second, that the language of the Act by which it intended to accomplish this result was the "psychopathic personality" provision—read independently or in conjunction with the "mental defect" provision. The Immigration Service in sexual-deviation cases has in fact uniformly proceeded under the "psychopathic personality" rubric alone,[12] without invoking the "mental defect" provision. But this is plainly proper. Although the Public Health Service's report did allude to the "mental defect" as well as to the "psychopathic personality" clause of the bill on which it was commenting, the

[12] See, *e.g.*, in addition to the instant case, *Rosenberg* v. *Fleuti*, 374 U.S. 449, 450–451; *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27 (C.A. 9), pending on petition for a writ of certiorari, No. 518, this Term; *Quiroz* v. *Neelly*, 291 F.2d 906 (C.A. 5); *Matter of P———*, 7 I&N Dec. 258 (1956); *Matter of S———*, 8 I&N Dec. 400 (1959); *Matter of P———*, 9 I&N Dec. 293 (1961).

chief emphasis throughout was on the "psychopathic personality" category;[13] and the Public Health Service, in its own directives under the 1952 Act, has consistently required its physicians to classify sexually deviate aliens in the "psychopathic personality" category.[14]

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[13] Congress was definitely informed, for example, that "[o]rdinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality'" and that "*[t]his classification will specify such types of pathologic behavior as homosexuality or sex perversion* * *" (emphasis added). Pp. 24–25, *supra*.

[14] Public Health Service, *Manual for Medical Examination of Aliens* (1963 ed.), Part II, chap. 6, § A, par. 6 (set forth in pertinent part in note 7, *supra*, pp. 11–12); *ibid.* (1956 ed.) (identical in relevant part with 1963 edition). And see American Psychiatric Association, *Diagnostic and Statistical Manual, Mental Disorders* (1952), pp. 7, 38–39, listing "sexual deviation" as a type of "personality disorder." The Public Health Service *Manual*, which indicates that its description of the various types of mental illness follows generally the nomenclature used in the American Psychiatric Association's *Manual* (P.H.S. *Manual* (1956 and 1963 eds.), Part II, chap. 6, § A, par. 1), identifies the "legal term 'psychopathic personality'" as equivalent to the medical designation 'personality disorder'" (Part II, chap. 6, § A, par. 6, quoted *supra*, pp. 11–12, n. 7). Cf. *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 657 (C.A. 9), remanded on other grounds, 374 U.S. 449.

It is clear, at all events, that an alien cannot be prejudiced by being proceeded against under the "psychopathic personality" clause alone. The "psychopathic personality" and "mental defect" clauses were enacted simultaneously and both have appeared in the Act side by side from the beginning. Since, in a deportation proceeding based on Section 212(a)(4), the specific nature of the allegedly excludable condition—*i.e.*, homosexuality or some other form of sexual deviation—must in any case be charged and proved, and since it is clear from the legislative history that the Congress meant to reach sexual deviation, it is a matter of no substantive significance under which rubric the proceeding is brought.

B. The congressional purpose to subsume sexual deviants under the "psychopathic personality" provision of the 1952 Act is confirmed by later legislative developments. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919, amended Section 212(a)(4) of the 1952 Act by striking the word "epilepsy" and substituting "or sexual deviation." See p. 2, n. 1, *supra*. Section 212(a)(4) now reads:

> Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect;

The committee reports of both Houses make clear that Congress desired to "resolve any doubt" as to its intent to make sexual deviates excludable that might have been engendered by *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449. The Senate report (S. Rep. No. 748, 89th Cong., 1st Sess., pp. 18–19) states:

> In view of the representations made by the U.S. Public Health Service that the term "psychopathic personality" would encompass homosexuals and sex perverts, the Congress in enacting the Immigration and Nationality Act omitted from the law any specific provision relating to the ineligibility of such persons.
>
> * * * * *
>
> However, the U.S. Court of Appeals for the Ninth Circuit on April 17, 1962, set aside a deportation order and enjoined its enforcement

holding that section 212(a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality" (*Fleuti* v. *Rosenberg*, 302 F. 2d 652).

To resolve any doubt the committee has specifically included the term "sexual deviation" as a ground of exclusion in this bill. The House report (H. Rep. No. 745, 89th Cong., 1st Sess., p. 16) is to the same effect."

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[15] Subsequent legislation may of course be considered to assist in the interpretation of prior legislation on the same subject. *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 277; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309; *Cope* v. *Cope*, 137 U.S. 682, 688; *United States* v. *Freeman*, 3 How. 556, 564–565. As observed in *Freeman*, *supra*, 3 How. at 564:

> [I]f it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. * * *

Nothing in *Wong Kam Wo* v. *Dulles*, 236 F. 2d 622 (C.A. 9), cited by petitioner (Br. 27, n. 23, is opposed. That case held merely that the later legislation there relied on did not, because of the peculiar circumstances involved, in fact provide a reliable guide to the meaning of the earlier enactment (236 F. 2d at 625). The court did not question—on the contrary it explicitly recognized—the *in pari materia* principle as applied to subsequent legislation. And not only the words but the legislative history of the subsequent legislation may be consulted to ascertain the intent of the earlier enactment. *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 277. Compare *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.

C. For the foregoing reasons, we submit that Judge Moore's dissenting opinion below is in error in stating that in the 1952 Act "Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a 'disorder of the personality' as to constitute 'psychopathic personality'" (R. 47). This suggestion is based on the portion of the Public Health Service's report to Congress in which the Service, after describing the "conditions classified within the group of psychopathic personalities" as "disorders of the personality * * * characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior," and after referring to one type of "psychopathic personality" as consisting of persons "ill primarily in terms of society and the prevailing culture," stated that "[t]he latter or sociopathic reactions * * * frequently include those groups of individuals suffering from * * * sexual deviation." Pp. 23–24, *supra*. The Service's use of the word "frequently" evoked the comment by Judge Moore that psychopathic personalities of the type referred to "evidently [do] not always" include persons with a "sexual deviation" (R. 46). This overlooks the fact that the Service, in this portion of its report, was referring only to a particular kind of psychopathic personality ("sociopathic reactions"). Later in its report, under the rubric *"Sexual perverts,"* the Service explained (see pp. 24–25, *supra*) that

> [o]rdinarily, persons suffering from disturbances in sexuality are included within the clas-

> sification of "psychopathic personality with pathologic sexuality"

and that

> [t]his classification [*i.e.*, "psychopathic personality with pathologic sexuality"] will specify such types of pathologic behavior as homosexuality or sexual perversion * * *.

Furthermore, in the final analysis the congressional purpose is revealed not by isolated language of the Public Health Service's report but by Congress' understanding of the Service's basic import. And critical to Congress, it is plain, was the Service's assurance that the legislative objective of excluding homosexuals and sexual deviates could be effectively accomplished without specifically alluding to sexual deviation. The Senate report, as we have seen, is explicit: "[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts"; the "change of nomenclature" is "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." P. 22, *supra*. There is no indication that the House committee did not fully acquiesce in these views.

II

THE "PYSCHOPATHIC PERSONALITY" PROVISION IS NOT VOID FOR VAGUENESS AS APPLIED TO HOMOSEXUALS

Petitioner contends that the "psychopathic personality" provision of Section 212(a)(4), if read to em-

brace homosexuals, is constitutionally deficient in that it failed adequately to warn him that homosexual behavior in this country, by furnishing evidence that he had a condition making him excludable when he entered, could lead to deportation (Br. 15–18). He cites *Fleuti* v. *Rosenberg*, 306 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449.[16]

In the *Fleuti* case, as in this case, the alien was ordered deported on the ground that he was inadmissible at entry because he was a homosexual at that time. That determination was based on evidence of a history of homosexual conduct spanning the critical date. The Ninth Circuit, believing that it was a matter of speculation whether such a determination would have been made on the basis of the alien's pre-entry conduct alone, or even whether the deportation proceeding would have been instituted solely on the basis of his pre-entry behavior, concluded that he had been prejudiced by the hearing officer's reliance, in part, on evidence which could not (in the court's view) constitutionally be considered—evidence of his post-entry homosexual activities. The evidence of Fleuti's acts in the United States, the court held, could be considered as bearing upon his condition at the time of entry only if he was properly warned, by the face of the statute, that such evidence would be relevant to

[16] See, also, *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27 (C.A. 9), pending on the government's petition for a writ of certiorari, No. 513, this Term, in which the Ninth Circuit cited its *Fleuti* decision as "control[ling]." Because of the conflict between the Ninth and Second Circuits, we acquiesced in the granting of the writ of certiorari in the present case.

determining whether he had been properly admitted and thus whether he could be deported. The court ruled that the statute, as it had been administratively construed, gave no such warning.

We challenge this reasoning.[17]

One answer to petitioner's contention is that, while the administrative finding as to petitioner's excludable status in 1955 was supported in part by evidence of his conduct in this country since his entry (see R. 25–26), the result would have been the same had no such post-entry evidence been introduced. Petitioner himself admitted in the administrative proceedings that he was a homosexual and that he had regularly engaged in homosexual conduct for many years prior to his entry. Statement, *supra*, pp. 5–6, 7. This evidence alone would have required his deportation regardless of his post-entry conduct. As the special inquiry officer noted in his decision, "[n]o serious question" had been raised either by petitioner, his counsel, or the psychiatrists whose reports the defense had submitted as to the fact of petitioner's "sexual deviation" (R. 26). The Board of Immigration Appeals similarly observed that "[n]o serious question is raised as to whether [petitioner] was a homosexual at the time of his admission for permanent residence" (R. 28).

Even apart from this evidentiary consideration, we submit that petitioner's constitutional contention is untenable for three independent reasons.

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[17] This Court granted the government's petition for a writ of certiorari in the *Fleuti* case, 371 U.S. 859, but found it unnecessary, in disposing of the appeal, to reach the issue decided by the court of appeals. *Rosenberg* v. *Fleuti*, 374 U.S. 449. See p. 18, n. 8, *supra*.

A. THE CONSTITUTIONAL REQUIREMENT OF FAIR WARNING APPLIES TO STATUTES REGULATING OR IMPOSING SANCTIONS UPON CONDUCT; IT DOES NOT APPLY TO AN ENACTMENT THAT MERELY PRESCRIBES STANDARDS FOR THE ADMISSION OF ALIENS

The requirement that a statute be clear and definite in its meaning reflects two distinct considerations: that statutes guide courts, executive officials, and administrative tribunals in determining rights and duties; and that they may also serve as guides to the individuals subject to them in planning their future conduct.[18]

1. As guides to adjudication, statutes must of course be sufficiently definite to provide judges, juries, executive officials, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly, consistently, and in accordance with the legislative purpose. *United States* v. *Petrillo,* 332 U.S. 1, 7; *Minnesota* v. *Probate Court,* 309 U.S. 270; *Mahler* v. *Eby,* 264 U.S. 32, 40–41.[19] A deportation statute, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with a reliable basis for determining what classes of aliens are deportable and thus leaves the selection of the aliens marked for expulsion to the caprice of the enforcing officials. But such a challenge cannot be made in reliance solely on the face of the statute, for it is the function of courts to go beyond naked statutory language and ascertain what

[18] For a discussion of these distinct considerations, see Note, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77 (1948); cf. *United States* v. *Petrillo,* 332 U.S. 1, 7; *Musser* v. *Utah,* 333 U.S. 95, 97.

[19] See, further, p. 44, and n. 27, *infra.*

the legislature intended by the words it used. The courts may properly look to any available source in aid of interpretation. Thus, in construing the coverage of the federal laws relating to exclusion and deportation, the courts have frequently consulted the laws' historical backgrounds, legislative histories, and similar materials for the purpose of ascertaining—far more precisely than if the inquiry stopped with the statutory words themselves—the types or categories of persons Congress intended to encompass within designated excludable or deportable classes.[20] So long as definite standards consistent with the legislative purpose can be elicited by these methods, no problem of inadequate guidance for administrators and adjudicators arises.

Here, as we have seen, the legislative history of the provision in question demonstrates that Congress intended to bar homosexuals from immigration. The primary function of the requirement of definiteness—the facilitation of adjudication—is thus fulfilled. Petitioner is therefore mistaken—as was the court of appeals in the *Fleuti* case—in thinking it material that there are differences of opinion among psychiatrists as to the proper meaning and scope of the term "psychopathic personality" (Pet. Br. 12–14; 302 F. 2d at 657–658). Similarly, the psychiatric significance of

[20] See, *e.g.*, *Immigration and Naturalization Service* v. *Errico*, Nos. 54 and 91, this Term, decided December 12, 1966; *Costello* v. *Immigration and Naturalization Service*, 376 U.S. 120, 123–128; *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Galvan* v. *Press*, 347 U.S. 522, 526–528; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 545–547; *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 531–533; cf. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 462–465.

homosexuality (see Br. *Amicus Curiae* of Homosexual Law Reform Society of America) has no relevance. Nor is it material whether the statutory phrase be considered a medical term, as petitioner argues (Pet. Br. 13–14), or a legal one, as the Public Health Service holds (see pp. 11–12, n. 7, *supra*). It suffices—as the Fifth Circuit observed in *Quiroz* v. *Neelly, supra,* 291 F. 2d at 907—that "to the Congress it [the term] was intended to include homosexuals and sex perverts. It is that intent which controls here."

The Court need not here explore in detail the full scope or reach of the phrase "afflicted with psychopathic personality," as used in Section 212(a)(4). It may indeed be "vague and indefinite" (see H. Rep. No. 1365, 82d Cong., 2d Sess., p. 46), but for purposes of deciding this case it is enough that the legislative history establishes that Congress intended the term to embrace petitioner's condition, homosexuality. That there may be doubt as to the applicability of the term to other conditions is no reason not to apply it here; "it will be time enough," as this Court observed in a different context in *United States* v. *Wurzbach,* 280 U.S. 396, 399, "to consider [the matter] when raised by someone whom it concerns." See also, *e.g., United States* v. *Petrillo,* 332 U.S. 1, 7, 9–12; *Williams* v. *United States,* 341 U.S. 97, 101; *Jordan* v. *DeGeorge,* 341 U.S. 223, 232; *Dennis* v. *United States,* 341 U.S. 494, 516.[21]

[21] Likewise, there is no occasion in the present case to attempt a precise delineation of the class, homosexuals, included (in our view) in Section 212(a)(4). There may indeed be cases where it is difficult to determine whether—and in precisely

2. While all statutes must guide administrators and adjudicators, some have the additional function of furnishing guidance to individuals as to how they should conduct themselves in order to avoid liability. This is the familiar function, for example, of all criminal legislation. The typical criminal statute requires the performance or avoidance of specified acts, and fairness requires that the acts be described in the statute with sufficient precision to give the individuals bound by it adequate notice of what conduct they must perform or avoid. It is with respect to this function of statutes that the "void for vagueness" principle applies. This is made clear by this Court's statement of the principle in *United States* v. *Harriss*, 347 U.S. 612, 617:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Similarly, in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, the Court declared:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to in-

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what sense—an individual should be deemed homosexual within the intent of the statute. Such might be the case of an individual who had had only a few, isolated homosexual experiences and did not regard himself as homosexual. There is no ambiguity on this score here, however (see pp. 49–52, *infra*). Moreover, problems of definiteness of this nature would remain even if Congress specified "homosexuality" as a separate ground of excludability.

> form those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

And in many other decisions the Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States* v. *Harriss*, *supra*, 347 U.S. at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct.[22]

Although the principle is primarily associated with criminal actions, it has also been invoked in civil suits. See, *e.g.*, *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239; *Miller* v. *Strahl*, 239 U.S.

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[22] See, *e.g.*, *Mishkin* v. *New York*, 383 U.S. 502, 506–507; *Bouie* v. *City of Columbia*, 378 U.S. 347, 350–355; *Wright* v. *Georgia*, 373 U.S. 284, 293; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287; *Roth* v. *United States*, 354 U.S. 476, 491–492; *Watkins* v. *United States*, 354 U.S. 178, 208; *United States* v. *Cardiff*, 344 U.S. 174, 176–177; *United States* v. *Spector*, 343 U.S. 169, 171–172; *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340; *Winters* v. *New York*, 333 U.S. 507, 515–520; *Musser* v. *Utah*, 333 U.S. 95, 96–97; *United States* v. *Petrillo*, 332 U.S. 1, 5–8; *Screws* v. *United States*, 325 U.S. 91, 101–104; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574; *United States* v. *Ragen*, 314 U.S. 513, 523–524; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453–458; *Herndon* v. *Lowry*, 301 U.S. 242, 261–264; *United States* v. *Wurzbach*, 280 U.S. 396, 399; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89–93; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348.

426, 434. The principle, however, is the same in both contexts—that legislation designed to control conduct must be definite enough to give adequate guidance.[22]

The rule that one is entitled to know, before one acts, what conduct the law forbids or requires has no application to the present situation. Here, as in *Fleuti*, the statutory ground for expulsion was not conduct by the alien after entry, but his *condition at the time of entry*. The relevant provision, as the majority below observed, "was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics*" (R. 41; emphasis the court's). Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Carlson* v. *Landon*, 342 U.S. 524; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Fong Yue Ting* v. *United States*, 149 U.S. 698; *The Chinese Exclusion Case*, 130 U.S. 581. This authority includes the power to exclude aliens applying for admission whom Congress deems undesirable because of some mental or physi-

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[22] Thus, in *Small Co.* v. *American Sugar Refining Co.*, *supra*, the Court stated (267 U.S. at 239):

> The defendant attempts to distinguish those cases [prior decisions of the Court holding legislation invalid on grounds of vagueness] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. * * *

cal condition, and to direct their deportation if their inadmissibility is discovered only after entry has been effected.[24] Section 212(a) (8 U.S.C. 1182(a)) is in large measure a catalog of such disqualifying conditions.[25] These provisions of the statute are in no sense guides to conduct. Therefore, the application to them of the principle requiring definiteness in behavior-governing legislation is unjustifiable.

It is the duty of the administrative authorities inquiring into an alien's admissibility to determine whether he is afflicted with any of the designated conditions; and if they have any doubt as to the meaning of any statutory term employed, there is no reason why they should not look to any available source—including the legislative history of a particular provision—to ascertain more precisely the legislative intent. If the issue arises, as here, in a deportation proceeding based on excludability at time of entry, the inquiry is the same: Is the alien within a class which Congress has declared to be inadmissible? The de-

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[24] Even those critics who have questioned the power of Congress to deport aliens for post-entry activities do not doubt that aliens inadmissible at the time of entry may properly be expelled later. See, *e.g.*, Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L.J. 1578, 1580, 69 Yale L.J. 262 (1959); cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266, 26 N.Y.U. L. Rev. 451, 466–467, 26 N.Y.U. L. Rev. 634, 656–657 (1951).

[25] In addition to aliens afflicted with psychopathic personality, Section 212(a) requires the exclusion, for example, of "mentally retarded" persons, the "insane," those who have had "one or more attacks of insanity," those suffering from "a mental defect," "narcotic drug addicts," "chronic alcoholics," and those suffering from "any dangerous contagious disease."

portation provision of Section 241(a)(1), here geared to inadmissibility under Section 212(a)(4), requires the determination of only one question: What was the alien's condition at the time of entry? If it is found that the alien was then afflicted with psychopathic personality in the sense that Congress used the term, deportability is established.

The Ninth Circuit, in the *Fleuti* decision, sought to avoid the conclusion that Sections 212(a)(4) and 241(a)(1), since they do not purport to govern behavior, need not provide clear warning to aliens excluded or deported by pointing out that, "[w]hile the post-entry conduct [of Fleuti] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition". It reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual practices after Fleuti entered this country * * * was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results" (deportation) might follow if he did not refrain from such conduct. 302 F. 2d at 656. The same argument is urged by the present petitioner (Pet. Br. 16).[26]

The Ninth Circuit recognized, of course, that Fleuti's post-entry conduct was not the basis for his

[26] Similarly, Judge Moore, in his dissent in the instant case, reasoned that "[h]ad the petitioner known that sexual deviation at the time of entry would be automatic grounds for exclusion, there is considerable reason to believe that he could have modified his behavior [in this country] so that he could not be considered a deviate at the time of entry" (R. 48).

deportation, but only evidence of his excludable condition at the time of entry. Thus, what the court did was to extend—in a way which we believe to be unprecedented—the doctrine of unconstitutional vagueness to protect an alien from inadvertently furnishing, by his post-admission behavior, evidence relating to his condition at time of entry. Under this theory it would be impermissible for the authorities to consider any evidence of an alien's post-entry acts, reflecting a homosexual condition at entry, which he might not have performed had he had warning of their evidential significance. Thus, such post-entry evidence as a letter, written by the alien, describing some aspect of his pre-entry homosexual conduct, or evidence of treatment for his affliction, voluntarily undertaken since entry, or statements made to employers, revealing his continuing condition, would have to be excluded for precisely the same reasons which, in the view of the court, rendered Fleuti's post-entry homosexual conduct itself inadmissible.

But, we submit, the vagueness doctrine is a canon of fairness whose purpose is to insure that no person shall incur a sanction, civil or criminal, for failure to conform his conduct to a statutory rule of action seeking to regulate his future behavior, unless the command of the statute is sufficiently clear that persons of normal intelligence will know what conduct is forbidden and what is allowed. It is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT CONGRESS—WHICH MAY ENACT GROUNDS OF DEPORTATION RETROACTIVELY—MAKE THE GROUNDS OF DEPORTATION CLEAR ON THEIR FACE

Even if petitioner had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to the lack of clarity of the deportation statute read on its face. An alien whom the government seeks to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. Congress, as this Court has repeatedly held, may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when committed. *Harisiades* v. *Shaughnessy,* 342 U.S. 580; *Galvan* v. *Press,* 347 U.S. 522; *Marcello* v. *Bonds,* 349 U.S. 302; *Lehmann* v. *Carson,* 353 U.S. 685; *Mulcahey* v. *Catalanotte,* 353 U.S. 692. See, also, *Bugajewitz* v. *Adams,* 228 U.S. 585, 591; *Ng Fung Ho* v. *White,* 259 U.S. 276, 280; *Mahler* v. *Eby,* 264 U.S. 32, 37, 39; *Eichenlaub* v. *Shaughnessy,* 338 U.S. 521, 529.

Under these decisions Congress could pass a statute retroactively making homosexual conduct by an alien within the United States a ground for his deportation. This being so, there can be no doubt that Congress could constitutionally make future homosexual conduct in this country by an alien a cause for his deportation, whether or not it expressed its intention in

a way that was not only clear to the administrative authorities and the courts, but was also plain on the statute's face to all persons concerned.

We recognize that in *Jordan* v. *De George*, 341 U.S. 223, 231–232, this Court examined, on grounds of inadequate warning, a statute making deportability turn on post-entry conduct. That decision, however, preceded the more recent decisions reaffirming the power of Congress to enact grounds of deportation retroactively. Moreover, the implications of that power with respect to the issue before the Court were not considered. The question of fair warning was not discussed in the briefs of the parties or argued before the Court (see 341 U.S. at 229), and the Court's consideration of the question appears to have been elicited by a dissent which was primarily based, not on the fact that the somewhat vague deportation provision gave inadequate warning, but on the lack of sufficiently clear standards to be applied by the administrative officials and the courts;[27] and the meaning of the statutory provision could in no way be clarified by recourse to its legislative history. The problem was thus one of the adequacy of the statute to guide its application by court and administrator. Se pp. 34–36, *supra*.

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[27] In *Mahler* v. *Eby*, 264 U.S. 32, a statute which authorized the Secretary of Labor to deport aliens (of designated classes) whom he found, after hearing, to be "undesirable residents of the United States" (Act of May 10, 1920, § 1, 41 Stat. 593) was sustained against a charge that it was unconstitutionally vague. The challenge to the statute was based, however, not on the ground that it provided no ascertainable standard of conduct for aliens to follow if they wished to avoid deportation, but on the ground that, by reason of the vagueness of the criterion of deportability, it amounted to an invalid delegation of legislative power to an executive officer. 264 U.S. at 40.

The fact that the provision involved in *De George* made deportability depend on the alien's conduct in this country also serves to distinguish that case. The statute there in issue (Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. (1946 ed.) 155(a)—now, in substance, 8 U.S.C. 1251 (a)(4)) provided for the deportation of "any alien * * * who is hereafter sentenced more than once to such a term of imprisonment [one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." 341 U.S. at 225. Although the provision did not, strictly speaking, require that the conduct of the alien, to be cause for his deportation, occur after the date of enactment—it was enough that the sentencing occur in the future—plainly the basic objective of the legislation was to deter the commission of serious crimes by resident aliens. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 9–10, construing the provision in issue as aimed at the "repeater" offender.[28] In other words the provision, as the majority below noted (R. 40, n. 13), was designed to "regulate post-entry conduct"—more pointedly, *criminal* conduct. There was thus some basis for

[28] See, also, S. Rep. No. 352, 64th Cong., 1st Sess., accompanying the bill (H.R. 10384) which added the provision in question to the immigration laws. The cited report (relied on in *Fong Haw Tan*, among other materials, as supporting the interpretation there adopted, see 333 U.S. at 9) noted that the provision was "intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation on the length of time after entry when they commit a second serious offense" (S. Rep. No. 352, *supra*, at 15).

testing the provision against the requirements of the fair-warning doctrine that had been developed in criminal cases. The purpose of the provision involved in *Fleuti* and the instant case, on the other hand, is not to regulate future conduct but to prevent the immigration of persons suffering from specified afflictions."[20]

In sum, the decisions of this Court establish that Congress could retroactively make homosexual conduct within the United States grounds for revocation of the statutory permission to remain, and for deportation. *A fortiori* it can make such conduct grounds for deportation in a statute to be applied prospectively, whether or not the statute is clear on its face. Similarly, Congress can constitutionally make evidence of homosexual conduct in the United States relevant to a determination of an alien's admissibility at the time of entry, whether or not the alien is advised of this relevance by the face of the statute.

C. SECTION 212(a)(4), INTERPRETED IN THE LIGHT OF ITS LEGISLATIVE HISTORY, PROVIDES ADEQUATE NOTICE THAT A HOMOSEXUAL ALIEN IS NOT ADMISSIBLE TO THE UNITED STATES AND MAY BE DEPORTED IF ERRONEOUSLY ADMITTED

Even if the constitutional requirement of fair warning were applicable to a deportation proceeding turning on whether the alien was properly admitted to the

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[20] We point out, finally, that the Court in *De George sustained* the statute there challenged. 341 U.S. at 231–232. The decision is thus not a clear holding that deportation legislation, to be valid, must meet the "fair warning" standard. In the light of the actual result reached, the decision may properly be viewed as no more than a rejection of the claim of invalidity on the assumption—*arguendo*—that the "warning" rationale was relevant.

United States, doubtless it would be less stringent in a case like this than in one where criminal sanctions were imposed. Cf. *Winters* v. *New York*, 333 U.S. 507, 515; *Mahler* v. *Eby*, 264 U.S. 32, 41. The type of notice constitutionally required prior to deportation of an alien such as petitioner would have to be determined in light of the following considerations: Petitioner is being deported because he was improperly admitted rather than on the basis of his conduct in the United States; deportation is a regulatory rather than a punitive remedy; Congress may retroactively, and thus entirely without warning, make even post-entry conduct grounds for revocation of its permission for the alien to remain in the United States. In this light and in view of this Court's prior decisions in cases where the claim of unfairness resulting from absence of warning was far less attenuated, we submit that there can be no constitutional requirement that the pertinent provision be plain on its face, without recourse to its legislative history.

This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness. See, *e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 285, 287; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572–574; cf. *Bouie* v. *City of Columbia*, 378 U.S. 347, 356–359.[30] Simi-

[30] Indeed, the Court has even considered the construction placed on the statute by the State's courts in the proceedings on review of the accused's conviction—*after* he has acted. In such decisions as *Beauharnais* v. *Illinois*, 343 U.S. 250, 253–254, 264, *Winters* v. *New York*, 333 U.S. 507, 512–515, *Cox* v. *New Hampshire*, 312 U.S. 569, 575–576, and *Fox* v. *Washington*, 236 U.S. 273, 277, the Court, in applying the test of definiteness to

larly, a statute's legislative history can be used to lend certainty to an otherwise insufficiently definite provision. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 620–623, where the legislative history of the Federal Regulation of Lobbying Act was cited by the Court in rejecting a challenge to the constitutionality of the Act on grounds of indefiniteness; and *Screws* v. *United States*, 325 U.S. 91, 98–104, where the legislative history of former Section 20 of the Criminal Code was considered in construing the section narrowly enough to obviate a charge of unconstitutional vagueness. Cf. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226–229; *United States* v. *Cook*, 384 U.S. 257, 260. There can therefore be no doubt that petitioner, whose right to statutory notice was, at best, far less clear, could fairly be chargeable with knowledge of what the legislative history of Section 212(a)(4) reveals with unusual clarity—that homosexuals are inadmissible to the United States.[21]

State criminal statutes, has treated the statute in each instance as though its text bore the interpretive gloss placed on it by the highest court of the State in the very proceeding in which the litigant before the bar had appealed from his conviction—in other words, after the commission of the act for which he had been brought to trial. See, *e.g.*, *Winters* v. *New York*, *supra*, 333 U.S. at 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation." But compare *Bouie* v. *City of Columbia*, 378 U.S. 347, 352–355; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456. And see Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 541 (1951); Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 73–74 (1960).

[21] It follows that the immigration authorities were not constitutionally obliged to inform petitioner at the time of his ad-

III

THE ORDER OF DEPORTATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT INVALIDATED BY THE FAILURE OF THE PUBLIC HEALTH SERVICE PSYCHIATRISTS TO EXAMINE PETITIONER

Assuming that a homosexual is deportable even if not proved to be a psychopath in a medical sense, petitioner's remaining contentions—that the evidence of petitioner's homosexuality was inadequate and that the law required his personal examination by the Public Health Service before it certified him as "afflicted with psychopathic personality" by reason of his homosexuality—clearly fail.

A. Petitioner's evidentiary argument (Pet. Br. 32–33, 34) is a belated effort to inject—for the first time

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mission to this country that homosexuality is an excludable condition, which if discovered after entry would necessitate his future deportation. The application form (FS–256a, Revised August 1952), executed by petitioner in requesting his entry visa, contained the following printed notation: "37. I have had the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of individuals excluded from the United States under the Immigration Act: * * *." This was followed by 24 numbered categories of persons whom the 1952 Act made excludable. The list included no reference to persons afflicted with psychopathic personality. Nor were homosexuals or sexual deviates mentioned. Following the list of excludable categories, immediately above petitioner's signature, the typewritten notation "I am not a member of any of the above mentioned classes" appeared (A.R. 6; Pet. Br. App. 37–41). The purpose of the form is not to provide information to the applicant but to enable the consular authorities to determine whether the applicant should be excluded.

in this Court—a factual question that was not in dispute below. Petitioner's counsel conceded at the deportation hearing that "no serious contest" existed as to whether petitioner was a sexual deviate, acknowledging further that the deviation "is homosexuality" and that the only question was whether petitioner's homosexuality made him a "psychopathic personality" within the meaning of the statute. On the basis of these concessions by counsel, and the evidence which had been received, the special inquiry officer noted in his decision that "[n]o serious question" had been raised in the proceedings as to the fact of petitioner's sexual deviation. The Board of Immigration Appeals likewise remarked that "[n]o serious question" existed as to the homosexuality of petitioner at the time of his admission to this country, while the court of appeals—without disagreement on this point by the dissenting judge—observed that it was "beyond contest" that petitioner had been a homosexual since before his departure from Canada.

The evidence was in fact overwhelming and undisputed. The government established at the hearing, through petitioner's own admissions under oath, that beginning in about 1949, six years prior to his entry, and continuing uninterruptedly to the date of his sworn statement (January 1964), petitioner had regularly engaged—on an average of three or four times a year—in homosexual behavior. This pattern of activity, extending over an interval of fourteen and one-half years, spanned the date of entry (June 22, 1955). It was further established that during the last five years of this period petitioner had actually been

living with one of his homosexual partners. Petitioner explicitly acknowledged that he was homosexual; and he had made the same admission to his draft board six years earlier. (Statement, *supra*, pp. 4–7.)

This evidence, coupled with the Public Health Service's certificate based upon it, compelled a finding that petitioner was homosexual when he entered.[22] It is true that petitioner, by his own account, had had occasional heterosexual experiences prior to his entry. But they were far fewer than his homosexual experiences, and hardly detract from his clearly—and concededly—dominant homosexual orientation.

Finally, the reports submitted by petitioner's psychiatrist-witnesses were in entire harmony with the hearing officer's finding, and petitioner's personal acknowledgment, that he was homosexual. The reports were in fact introduced for a quite different purpose—to show that petitioner, while homosexual, was not dangerous or psychopathic. Dr. Falsey noted in his report that petitioner had "explained

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[22] The fact that the hearing officer, in concluding that petitioner was homosexual when he entered, took into consideration his post-entry as well as his pre-entry activities (see R. 25–26) does not imply, as petitioner erroneously argues (Pet. Br. 33–35), that petitioner has been ordered deported *because of* his post-entry acts. Where the issue is whether a person was afflicted with a particular condition at a specified time, common sense and experience require that the fact-finder consider conduct after as well as prior to that time. The decision of the special inquiry officer makes clear that the basis for the deportation order was the officer's finding that petitioner was afflicted with sexual deviation "at the time of his entry" (R. 24, 27). As the court below observed, "there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition" (R. 41).

quite frankly that he has been homosexual" and did not question the correctness of this self-analysis. The doctor went on to say that his examination of petitioner had failed to reveal "delusional trend," "hallucinatory phenomena", or psychosis; but the absence of such symptoms, as we read the statute, has no relevance. Dr. Ullman, while reporting that petitioner's "sexual structure" appeared "fluid", and that he had heterosexual as well as homosexual "interests", similarly referred to his "homosexual orientation", stressing only that he did not believe petitioner was "a psychopath".[22]

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[22] In view of the absence of any serious factual question, there is no occasion for a remand in light of *Woodby* v. *Immigration and Naturalisation Service*, Nos. 40 and 80, this Term, decided December 12, 1966, where this Court held that the government in deportation proceedings must establish the facts supporting deportability by "clear, unequivocal, and convincing evidence." The Court did not indicate in its opinion whether this new rule was to have retroactive effect, and so control proceedings in which unexecuted final orders of deportation had, as here, already been entered. *Cf. Johnson* v. *New Jersey*, 384 U.S. 719, holding that the rules of *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436, have prospective application only. And see *Linkletter* v. *Walker*, 381 U.S. 618. The Immigration and Naturalization Service, however, as a matter of administrative policy, is applying the rule of the *Woodby* case retrospectively. It has directed that all cases pending in the courts involving review of deportation orders be administratively reexamined in the light of the *Woodby* decision. In cases where the *Woodby* standard is found to be applicable, and was not applied, the Service is entering into stipulations, or is obtaining court orders directing, that the cases be remanded for administrative reconsideration in the light of *Woodby*. In cases not pending in the courts, the Service has directed that before any deportation order is executed the record be examined in the light of the new *Woodby* standard. If

B. The contention (Pet. Br. 29–30) that the deportation proceedings were defective because the Public Health Service physicians who signed the certificate attesting to petitioner's excludability at entry as a sexual deviate did not personally examine him in reaching this conclusion is based on the mistaken assumption that the Immigration and Nationality Act makes the same procedures applicable both to exclusion proceedings and to deportation proceedings in which the charge of deportability is excludability at entry. The Act provides that the physical and mental examination of "arriving aliens" shall be conducted by medical officers of the Public Health Service, who shall certify, for the information of immigration officers and special inquiry officers, any physical or mental defect or disease that may be observed. Any such alien who is certified as inadmissible on any of the medical grounds specified in Section 212(a), including the "psychopathic personality" ground of paragraph (4), may appeal to a board of medical officers, to be convened by the Surgeon General, with the right to present testimony by one expert medical witness. Section 234, 8 U.S.C. 1224. The final certification goes to an examining immigration officer, who must detain the alien for further inquiry before a special inquiry officer unless it appears "clearly and beyond a doubt" that the alien is entitled to enter. The de-

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it is determined that the *Woodby* standard is applicable, and was not applied; the Service will stipulate, or will itself move, for administrative reconsideration in the light of *Woodby*. However, there would be no point in remanding a case that presented no substantial factual question—and that, we believe, is this case.

cision of the examining officer, if favorable to the alien, is subject to challenge by any other immigration officer; the effect of such a challenge is to require further inquiry before a special inquiry officer. Section 235(b), 8 U.S.C. 1225(b). The decision of the special inquiry officer must, in either case, be based solely on the medical certificate; he may not independently inquire into the facts underlying the physicians' determination. Section 236(d), 8 U.S.C. 1226(d); cf. *Johnson* v. *Shaughnessy*, 336 U.S. 806, 809.

The procedure for *deporting* an alien is radically different—and this whether the basis for the expulsion is the alien's asserted excludability at the time of his entry or subsequent conduct. The expulsion procedure (prescribed by Section 242(b) of the Act, 8 U.S.C. 1252(b)) consists essentially of an adversary proceeding in which the government, not the alien, bears the burden of proof. The special inquiry officer's decision must be based solely on the evidence introduced at the hearing and he has full authority to try *de novo* all factual questions on which the charge of deportability depends.

The deportation procedure prescribed by the Act was exactly followed in this case. Petitioner does not contend otherwise. His claim is that because an alien may not be excluded on medical grounds without a medical examination he must be given a like examination before a deportation order may be entered. The applicable statutes, as we have seen, prescribe no such requirement.

In addition, the record establishes that the government, prior to the hearing on the charge of deporta-

bility, expressly offered petitioner the opportunity to undergo the Public Health Service medical examination which he now insists was required. Petitioner declined the invitation. The government renewed its offer at the hearing, and it was again declined, petitioner's counsel stating that she "w[ould] not have him submit to an examination by the Public Health Service." Statement, *supra*, p. 9. Petitioner, in these circumstances, can hardly be heard to complain now that the record is deficient in this regard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
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JANUARY 1967.

APPENDIX

United States Department of Justice
Immigration and Naturalization Service

File A-10 082 545—New York, N.Y.

MATTER OF CLIVE MICHAEL BOUTILIER, RESPONDENT

IN DEPORTATION PROCEEDINGS

Transcript of Hearing

Before Special Inquiry Officer Ira Fieldsteel

Hearing held on March 8, 1965 at 20 West Broadway, New York, N.Y.

* * * * *

In behalf of Service: Vincent A. Schiano, Trial Attorney, New York, N.Y.

In behalf of respondent: Blanch Freedman, Attorney-at-law, 299 Broadway, New York, N.Y. 10007.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. Sir, do you speak and understand the English language?

A. Yes, sir.

Q. What is your full, true and correct name?

A. Clive Michael Boutilier.

Q. I have before me an order to show cause issued on January 28, 1965 which says that a person of your name is now illegally in the United States and could be deported for reasons stated in the order to show

cause. Did you get a copy of this paper on January 28, 1965?

Miss FREEDMAN: We will concede that he received a copy of the order to show cause dated January 28, 1965 on February 4, 1965.

SPECIAL INQUIRY OFFICER: On February 4th, yes I see. Excuse me, the certificate was served February 4, 1965.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. The purpose of this hearing today is for me to decide two things. First, whether you are illegally here and could be deported, and secondly, even if you could be deported whether you have to be deported or whether there is some form of relief from deportation available to you. Do you understand the purpose of this hearing today?

A. Yes.

Q. Are you represented by Miss Freedman as your attorney?

A. Yes, sir.

Q. Will you please stand up and raise your right hand? Do you——

Miss FREEDMAN: He isn't going to testify, but I don't mind his being sworn just for identification purposes.

SPECIAL INQUIRY OFFICER: I see.

SPECIAL INQUIRY OFFICER TO RESPONDENT:

Q. Well, will you raise your hand? Do you solemnly swear the testimony you will give today will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, sir.

SPECIAL INQUIRY OFFICER: Now, when you say, Miss Freedman, that he is not going to testify, you mean he is not going to testify as to the basic charge in this matter?

Miss FREEDMAN: That is correct, sir, at this time.

SPECIAL INQUIRY OFFICER: Well, how about let's say allegations of fact, 1, 2, 3?

Miss FREEDMAN: Right. Now, we will concede that allegation No, 1 in the order to show cause is correct. Allegation 2 is correct. Allegation 3 is correct. We admit them. We deny allegation No. 4 and, of course, we deny the conclusion of law that is set forth here.

* * * * *

SPECIAL INQUIRY OFFICER: * * *

Mr. Schiano, do you have any evidence to offer in support of the Government's charge?

Mr. SCHIANO: Yes, I am offering the certificate from the Public Health Service doctors, together with the record of sworn statement. There are two statements there, one in the form of questions and answers and in the form of an affidavit. I have shown to counsel both statements and the certificate.

* * * * *

SPECIAL INQUIRY OFFICER: All right, there will be a short recess.

RECESS

RESUMED

SPECIAL INQUIRY OFFICER: Let the record reflect that there was a short recess during which time counsel consults with her client with the record of sworn statement of January 13, 1964 after which the hearing is resumed.

All right, Miss Freedman, is there any objection now to this statement?

Miss FREEDMAN: Going into evidence together with the doctor's report is that what you are referring to?

SPECIAL INQUIRY OFFICER: Yes.

Miss FREEDMAN: No, except that I would an opportunity [*sic*] to examine Dr. Smith if need be. I mean I reserve that right. I want the record to reflect that. At this moment I have no objection to this going into evidence with that reservation. Maybe that after I produce my own medical evidence it won't be necessary but at this point I want to reserve the right to first examine Dr. Smith with respect to his report.

Mr. SCHIANO: Let me say this. I will make Dr. Smith available for cross examination when the time comes. However, in an off the record discussion with counsel I did offer her the opportunity to present any additional psychiatric reports from private psychiatrists which I would be willing to re-submit to Dr. Smith together with the documents of record for any reconsideration of the certificate. I do wish the record to note we did offer the respondent an opportunity to be personally examined by the Public Health Service but he did decline that which was his right to decline. However, I again offer him an opportunity to become again examined by the Public Health Service doctors together with any psychiatric reports or any other physician's account he wishes to relate to the case.

Miss FREEDMAN: We will bring in our own medical evidence. He will be examined by our own doctor and we will submit to you the findings. I will not have him submit to an examination by the Public Health Service.

SPECIAL INQUIRY OFFICER: In what form do you propose to submit your psychiatric evidence in the form of a report, an outside report by a psychiatrist?

Miss FREEDMAN: Correct, by a psychiatrist.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER,
Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, at the outset of his brief,[1] pointed out that the legal and other problems inherent in this case stem from the confusion that has resulted from administering the statute as applying to the behavior of aliens instead of to their medical condition, as the statute reads. In its brief, the respondent has not answered, discussed or even commented on this dichotomy. Petitioner, there-

[1] p. 10

fore, repeats and reiterates this postulate. Unless this basic error is recognized and corrected, the administration of the statute, *even as amended*, leads to a morass from which there is no extrication.[2]

POINT I

The Statute Relates to the Condition of the Alien

Petitioner would stress that the statute as enacted is neither vague nor uncertain. While the term "psychopathic personality" is considered imprecise,[3] the Public Health Service could describe the symptoms which it considered fell within that description. There is nothing therefore, on the face of the statute that gives rise to the many questions dealt with in the briefs presented The problems have arisen solely from the fact that the statute has been administratively re-written. Petitioner should be able to rest on the clear and admitted fact[4] that he was never shown to have been an alien excludable under the language of the law as it reads to the lawyer or the layman. It provides that persons "*afflicted* with psychopathic personality" be excluded. (Italics ours). If words are to have any meaning, then being "afflicted" can relate only to a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior. But it necessarily implies a

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[2] It was pointed out in petitioner's brief (p. 10) how the court below spoke of characteristics and behavior as if they were interchangeable. The same is true of respondent in its brief. While the tenor of the entire brief is that the statute excludes persons because of homosexual behavior, in order to justify use of post-entry conduct, it finds it necessary to state (p. 16) "Here as in *Fleuti*, the statutory ground for expulsion was not the alien's conduct after entry, but his *condition* at the time of entry". (Italics ours). This is repeated in other places.

[3] Res. Br., p. 23.

[4] Respondent states "They (administrative authorities) did not find that he was psychopathic in a clinical sense." (Res. Br., p. 19).

condition that is medically ascertained — not by a rubber-stamp certification as was done here, but by a professional examination.

The petitioner has basically argued from the initial hearing before the respondent up to the present time that the statute be applied to him as it reads — namely, on the determination of whether he is "afflicted with psychopathic personality". That means applying the statute to his physical or psychiatric condition.

He has been side-tracked from this position, by the insistence of respondent — unfortunately supported by some court decisions[5] — that the statute does not mean what it purports to say. Respondent claims — and it has so administered the statute that the words "afflicted with psychopathic personality" means a homosexual, and a homosexual is to it anyone who has engaged in homosexual acts. Respondent says[6] it does not consider the statutory term a "euphemism" for homosexual as petitioner has charged; it considers the term merely to *include* homosexuals. However, it is hard put to suggest a single other instance to which it has been applied or might be applied by respondent.[7]

This raises the initial dilemma brought about by substituting this administrative interpretation for the congressional mandate, because it substitutes behavior or conduct for condition. The statute as it reads requires a medical examination and finding of a *condition*, physical or psychiatric. The administrative interpretation has no guide lines, no boundaries, no test of any kind. Respondent grudgingly admits the problem thus created, saying, "There may indeed be cases where it is difficult to determine whether — and in precisely what sense —

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[5] Res. Br., p. 19, note 9.

[6] Ibid.

[7] Res. Br., p. 36.

an individual should be deemed homosexual within the intent of the statute." [8]

The difficulty stems precisely from enforcing the statute as relating to sexual behavior. That difficulty does not exist when the statute is enforced as it reads, for then homosexuality, that is medically a pathological condition, is reached by the statute.

Respondent operates on the assumption that it is talking about condition when it speaks of petitioner as a "homosexual", as for instance, when it heads Point II of its brief (p. 31) "THE 'PSYCHOPATHIC PERSONALITY' PROVISION IS NOT VOID FOR VAGUENESS AS APPLIED TO HOMOSEXUALS". But labeling one a "homosexual" is not describing a condition — it is merely misusing a word. It has been pointed out in Petitioner's brief (p. 10) that medical science today does not speak of homosexual but only of homosexual behavior or conduct. In this connection, it is of interest to note that the United States Civil Service Commission is applying this scientific criterion in evaluating applicants for government employment. In a communication addressed to The Mattachine Society of Washington, dated February 25, 1966, it stated in part:

> "We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that 'homosexual' is a proper metonym for an individual. Rather we consider the term 'homosexual' to be properly used as an adjective to describe the nature of overt relations or conduct. . . .
>
> "In the light of these pervading requirements it is upon overt conduct that the Commission policy operates, not upon spurious classification of individuals."

The respondent's administration of the statute has been predicated upon this "spurious classification". As

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[8] Res. Br., p. 36, note 21.

so construed and administered, the statute provided no adequate standard. Even if, as respondent contends, "Congress intended to bar homosexuals from immigration", since such a category is not really definable, it provides no standard.[9] In this respect, too, it would fall within the holding in *Mahler v. Eby*, 264 U.S. 32, 40, that it constituted an invalid delegation of legislative power to an executive officer.

Respondent says: "nor is it material whether the statutory phrase be considered a medical term — or a legal one . . ."[10] — that it is the intent of Congress that controls. As we have suggested, it is most material, because if it is a medical term, it can apply only to a medical condition, and it is arrant nonsense to say it is a medical term but it is not meant to be applied as such.[11] If not, then why was it used? Was there such a paucity of language at the disposal of Congress to say what it meant?

POINT II

On the Question of Legislative History

Respondent has attempted to justify its administrative interpretation by urging that while Congress did not say it, respondent knows that its interpretation of the statute is what Congress intended to say. In other words, while Congress enacted legislation ostensibly dealing with the condition of aliens, it really meant to deal with their behavior patterns. The basis of this argument is the legislative history behind the enactment of the 1952 law. But resort to legislative history is necessary or

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[9] Res. Br., p. 36-37, note 21.

[10] Res. Br., p. 36.

[11] Respondent actually acknowledges that it is a medical term (Res. Br., p. 19, note 9) saying "The category (psychopathic personality) clearly encompasses *other medical* types as well." (Italics ours).

meaningful only if the statute on its face is vague or ambiguous. This is not the case here. As stated above, if the statute is enforced as it reads, petitioner does not challenge it as "vague" or unconstitutional. It is the re-writing of the statute by respondent that is objected to and that raises questions of vagueness and impossibility of proper administration.[12]

When the court does resort to legislative history it is to *clarify* statutory language — not to create new and different provisions that Congress did not adopt. For example, in the recent case of *Immigration & Naturalization Service v. Errico*, 385 U.S. 214, this court reviewed the legislative history of Section 241(f) of the same act. That provision bars the deportation of an alien who gained permanent admission to the United States through the perpetration of a fraud, if the alien is an immediate relative of a citizen. The court examined the legislative history — not to make the term "fraud" mean something not intrinsically fraudulent — but to determine whether the *proved acts of fraud* in that case were the type of fraudulent acts within the legislative intent. In the instant case, the respondent's use of legislative history is not to determine whether a *proved medical condition of psychopathic personality* was intended to be embraced by the statute. On the contrary, "legislative intent" is being used to escape its burden of proving that the homosexual acts of the petitioner medically constituted a psychopathic personality.

Moreover, the legislative history does not bear out the respondent's contention, as has been pointed out in detail in petitioner's brief (Point II, pp. 21-28).

The respondent's contention that the term "psychopathic personality" includes all homosexual acts or behavior rests, exclusively, upon how a committee of nine Senators construed a medical report of the Public Health

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[12] Pet. Br., p. 11, note 3.

Service, dated May 15, 1951 (Res. Br., pp. 21-22). It is not true as indicated by respondent that House Judiciary Committee Report [#1365] accompanying the adopted House bill (H.R. 5678) "referred to the advice of the Public Health Service mentioned in * * * Senate Report #1137". (Res. Br., p. 22). The fact is that the House Judiciary Committee in its report did not interpret or summarize for Congress the contents of the Public Health Service Report; instead, it set out verbatim the full text of that Report, leaving it to speak for itself.

A normal reading of that report leads naturally to the conclusion reached by Judge Leonard Moore in his dissent below that "Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a 'disorder of the personality' as to constitute 'psychopathic personality' " (R. 47).

Respondent concedes that the Public Health Service Report did not explicitly advise that the term psychopathic personality automatically embraced all homosexual conduct (Res. Br., p. 25), but argues that it intended to convey to Congress the impression that it did. In support of this thesis, it notes (Res. Br., p. 27, note 13) that "Congress was definitely informed, for example, that 'ordinarily, persons suffering from disturbances in sexuality are included within the classification of' psychopathic personality with pathological sexuality' and that *this classification will specify such types of pathologic behavior as homosexuality or sex perversion* * * * '". This is set forth and indeed emphasized by respondent without a moment's attention being paid to the recurrent use of the term "pathologic". It is indeed treated as if it did not appear in the text at all, given no meaning whatsoever, whereas, as Judge Moore pointed out, the report was referring to *pathologic* sexuality and *pathologic* behavior that manifested itself in homosexuality or sex perversion. The significant words are the *pathologic condition.*

This is distorted by respondent into its belief that the Public Health Service *believed* that the clause "aliens afflicted with 'psychopathic personality'" would effectively exclude all persons who have engaged in homosexual practices from entry (Res. Br., p. 25). How speculative may the respondent get? Clearly, such conjecturing is unwarranted. Particularly when the history discloses that Congress, when confronted with the task of legislating about sexual behavior decided and chose to make excludable such sexual behavior that medically could be classified as *pathologic* — and none other.

This logically explains why the proposal of the House Bill of 1951 — H.R. 2379 — making excludable "aliens who are homosexuals or sex perverts" was eliminated from the final enactment of the law.

However, regardless of what respondent insists was the Congressional intent when it enacted Sec. 212(a)(4) in the 1952 Act, Congress itself has decided its language was not free from doubt and hence amended it in 1965[13] in order to resolve any doubt. So that the provision as it applied to petitioner, to wit:

> (4) Aliens afflicated with psychopathic personality, epilepsy, or a mental defect

has been replaced by

> (4) Aliens affliected with psychopathic personality, or sexual deviation, or a mental defect.

It is the position of respondent that Congress changed nothing by this change of language; that these two sentences mean the same thing and that they apply equally to the same persons (except that the term epilepsy has been removed from the section).

If these two provisions mean the same thing, then indeed language is meaningless. If, as respondent contends, the words "afflicted with psychopathic personal-

[13] Sec. 15(b) of the Act of October 3, 1965, 79 Stat. 919.

ity" at least include [14] sexual deviates, then the use of that term as a separate category in the amended section is obviously a superfluous redundance.

The position of the respondent is untenable. The amended section is a recognition by the Congress in 1965 that whatever the intent had been when the law was enacted in 1952, the language then used did not express what has now been enacted by this Congress.[15] Here as in *Cope v. Cope*, 137 U.S. 682, cited by respondent, the later act only helps to make clear that what it now includes was omitted if not excluded in the earlier one.

POINT III

On the Issue of Vagueness

a.

The amendment of Sec. 212(a)(4) by Congress in 1965 should dispose of any doubt that the respondent's interpretation of the statute rendered it vague.

Respondent points to the 1965 amendment as proof of Congressional intendment when the statute was enacted in 1952. This ignores the very reason for the amendment, which it quotes from the Senate report (No. 748, 89th Cong., 1st Sess.) as being "to resolve any doubt" (Res. Br., p. 29). The amendment thereby also resolved any doubt that the statute as construed and administered by the respondent had rendered it vague and uncertain. For what is doubt if not lack of clarity? It is so defined in Funk & Wagnalls College Standard Dictionary:

"Lack of certain knowledge; uncertainty",

and doubtful is defined in part as

"Indistinct; vague; ambiguous".

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[14] See Res. Br., p. 19, note 9.

[15] See Wong Kam Wo v. Dulles, 236 F.2d 622.

So that despite the position taken by the respondent on this argument, Congress itself has conceded that the statute as it had been administered by respondent was vague. It can hardly be denied that whatever construction may hereafter be put upon the amendment, the section today provides notice of a Congressional purpose to exclude which was absent from it when petitioner came to this country and during the years he lived here prior to the commencement of deportation proceedings against him.

b.

Petitioner has contended that as administered by respondent the statute is unconstitutionally vague and has deprived him of notice and due process. This was true as of the time of his entry and of the time he has been resident here.[16]

Respondent urges (Res. Br., p. 46) that on his entry here, petitioner was bound by the statute as it had been construed and therefore this was notice to him. The fact of the matter is that there was nothing to apprise petitioner when he voluntarily took up his residence here that past homosexual acts made him excludable and that future ones would make him deportable.

Clearly, the statute made no mention of it; the visa application which listed all other grounds for exclusion

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[16] In urging that the court will look to authoritative sources for interpretation that will save a statute from the charge of vagueness, respondent refers to cases where the meaning of a state statute has been construed by its own courts. (Res. Br., p. 47). In *Giaccio v. Pennsylvania*, 382 U.S. 399, this court unanimously held at the last term of court that the state statute was still vague after the state court interpretations attempting to uphold its validity, saying: "We hold that the . . . Act is constitutionally invalid both as written and as explained by the Pennsylvania courts". (p. 405). Similarly here, the departmental and court decisions supplied no guide lines or standards nor could they, thus leaving the statute as administered vague and uncertain.

did not mention it: (Appendix A, Pet.'s Br.).[17] Nor can it be claimed that he should have known that the statute was construed to exclude persons who had engaged in homosexual conduct because the cases cited by respondent[18] as so holding were decided after his entry in 1955. (*Quiroz v. Neelly*, 291 F.2d 906 in 1961); *U.S. v. Flores Rodriguez*, 237 F.2d 405, in 1956); *Ganduxe y Marini v. Murff*, 183 F. Supp. 565, in 1959). To impute to him now knowledge at the time of his entry of something which may have come into being long after is violative of every instinct of justice and fairness. And to infer thus that petitioner is not prejudiced by respondent's construction and application to him of the section is preposterous. Had petitioner been apprised by the statute or by the State Department's visa application that his 15 to 20 homosexual experiences between the ages of 16 and 21 prior to admission to the United States would classify him — without medical proof — as pathologic or mentally affected, and that those experiences would forever menace him, subjecting him to deportation, is it likely that he would have uprooted himself from Canada and established his home and livelihood in this country upon so precarious a residence! Indeed, the damage and hurt to petitioner by deportation today is so grave that in the circumstances of this case, it is a denial of due process.

c.

As has been pointed out several times, respondent is very agile in jumping from behavior to condition to suit its argument. Thus, in urging that the vagueness doctrine is not applicable to petitioner, it states:

> "It is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities." (Res. Br. p. 42)

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[17] Res. Br., p. 48, note 31.

[18] Res. Br., p. 19, note 9.

Now, respondent cannot have it both ways. It is precisely the lack of any proof of a condition in the petitioner either prior to entry or post-entry which he has urged throughout. But respondent has said we are not concerned about his condition, we know how he has behaved and that is sufficient. The point that petitioner has made is that if his condition was involved, that could not be hidden, but if behavior was involved, that could be controlled by him since he does not suffer from a pathologic condition.[19]

If respondent applied the statute to petitioner as he contends it reads, namely, as to whether he is "afflicted with a psychopathic personality", that would be addressed to his condition and as to that respondent has offered no proof and so admits.[20] Since respondent, however, has administered the statute as applying only to his behavior, the failure of the statute so construed to advise him that subsequent behavior would be used to expel him from this country, denied him the opportunity to knowingly refrain from certain conduct. This is not to hide a condition — the petitioner has concealed nothing — but to regulate behavior, if the impact of the statute demand it.

But, respondent argues, even if the statute aims at post-entry conduct, Congress can enact legislation after an alien's arrival that makes him deportable, so why the hue and cry because the statute is defined retroactively to make him deportable. The essential point is that while Congress can, Congress hasn't. Even when in 1965, it amended Section 212(a)(4) by adding the term "or sexual deviation" to "resolve any doubt",[21] it did not enact legislation to make post-entry sexual deviation a ground for deportation. Yet the net effect of re-

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[19] R. pgs. 12-16; statements of Dr. Falsey and Dr. Ullman.

[20] Res. Br., p. 19.

[21] S. Rep. No. 748, 89th Cong., 1st Sess., pp. 18-19.

spondent's order with respect to this petitioner is to deport him for something which neither statute nor interpretation could have given him notice of at the time of his entry nor thereafter.

Respondent further contends that since Congress could explicitly make conduct deportable retroactively, it could *implicitly* make future conduct deportable. Petitioner suggests first that Congress has not made sexual conduct after entry deportable, and secondly, respondent does not point to a single instance where deportation has been based upon a ground that was implicit and not expressed in specific language.

This court in *Jordan v. De George*, 341 U.S. 223, held that aliens are entitled to protection under the due process clause against a lack of fair warning that conduct of a kind may render them deportable. While the purpose of the present statute is not to regulate conduct, as respondent correctly states (p. 46), when resort is made to future conduct as it has been in this case because of the administrative interpretation of the statute, the petitioner was entitled to adequate notice. As Justice Jackson said in his dissent in the *Jordan* case,

> "A resident alien is entitled to due process of law. We have said that deportation is equivalent to banishment or exile. . . . This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime." (p. 243)

Respondent argues that the *Jordan* case was decided before *Harisiades v. Shaughnessy*, 342 U.S. 580 and *Galvan v. Press*, 347 U.S. 522, which cases re-affirmed Congress' power to make post-entry conduct deportable and since the constitutional protection against ex post facto laws was held not available to aliens, no other constitutional protection should be available to them.

This is indeed faulty reasoning to say nothing of the brutal philosophy behind it. This court, very reluctantly

and because of a long established tradition[22] upheld the power of Congress to legislate *ex post facto* in the area of deportation. But in numerous cases since then, this court has made clear that within the ambit of the power of Congress to legislate, the alien should be accorded every other protection, including limiting the meaning of the language used most strictly. The *ex post facto* laws are related to the constitutional power of Congress to act; due process and other constitutional guarantees are protections against abuse of power under the guise of such legislation. The court thus followed *Galvan* with *Rowoldt v. Perfetto*, 355 U.S. 115 (1957). Here the drastic harshness of deportation for membership in or affiliation with (*ex post facto*) proscribed organizations was lessened by this court's construction of the term membership to mean a knowing and meaningful association with the barred organization. (Id. 120). *Rowoldt* was affirmed and reinforced in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) by the court's ruling that the required meaningful membership in proscribed organizations may not be inferred by the alien's silence. (Id. 479). And in the most recent case, *Sherman v. I.N.S.*, 385 U.S. 276 (1966), the court held that deportation being a forfeiture of residence, "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." (Id. 286). See also *Costello v. I.N.S.*, 355 U.S. 115 (1957) where contending interpretations of the relevant deportation provision were both possible, the court adopted the one that avoided deportation, distinguishing the case from the earlier adverse decision in *Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950).

The foregoing cases well justify the expectation that the constitutional safe-guard against *ex post facto* laws

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[22] *Galvan v. Press*, 347 U.S. 682.

which has been withheld from non-citizens is not necessarily dispositive of all future holdings to be made by the court. In *Galvan v. Press, supra,* (p. 530) Mr. Justice Frankfurter, in writing for the court, said:

> "In light of the expansion of the concept of due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> "But the slate is not clean . . ."

We would hope that on revisit by the court, advanced judicial thinking will find a way to "clean the slate" so that our canon of fairness and justness would apply alike to all persons dwelling here under our constitution, be they citizens or foreign-born.

In any event, whatever the rulings with respect to *ex post facto* laws, it can be no reason to deprive non-citizen of the established right to due process of law, which is the issue before this court.

POINT IV

The Failure To Prove Deportability

Petitioner is not urging that the procedures prescribed by statute for exclusion proceedings are necessarily applicable to a deportation proceeding. What petitioner is saying is that when the deportation charge is that the alien was excludable at time of entry, the *proof* that he was excludable can be no less in the deportation case than it

would have been in the exclusion proceeding.[23] But in this Alice in Wonderland situation that respondent's application of the relevant statute has brought petitioner, the respondent protests that in the deportation proceeding "the government, not the alien, bears the burden of proof" (Res. Br., p. 54) and blandly argues that this has been met on a record that admittedly would not sustain an exclusion, where the government does not have the burden of proof. The absence of a medical examination by the Public Health Service is considered immaterial since it treats the Congressional requirement therefor as a nullity and immaterial in determining whether the alien was "afflicted with a particular condition", although that is the very issue in the case. (Res. Br., p. 51, note 32.)

[23] Indeed, in the light of this court's holding in Woodby v. Immigration and Naturalization Service, during the current term, the proof must be much more substantial.

CONCLUSION

Counsel for petitioner feel in concluding this brief that they should not refrain from suggesting that this case presents an inherent question of ultimate morality which ought not to be by-passed. In the light of modern scientific investigation, making private, consensual homosexual practices between adults the subject of oppressive legislation and ostracism, is reminiscent of history's other witchhunts. To the extent that the statute involved here applies sanctions to persons labeled "homosexuals" the forthright testimony of distinguished professors of medicine, sociology, anthropology and other sciences presented in the *amicus* brief of the Homosexual Law Reform Society, submitted on this argument, plainly shows that it is factually wrong, socially wasteful and morally inexcusable.

The order of deportation should be set aside.

Respectfully submitted,

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On the Brief
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SUPREME COURT OF THE UNITED STATES

No. 440.—October Term, 1966.

Clive Michael Boutilier, Petitioner, v. Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1967.]

Mr. Justice Clark delivered the opinion of the Court.

The petitioner, an alien, has been ordered deported to Canada as one who upon entry into this country was a homosexual and therefore "afflicted with psychopathic personality" and excludable under § 212 (a)(4) of the Immigration and Nationality Act of 1952. 66 Stat. 182, 8 U. S. C. § 1182 (a)(4).* Petitioner's appeal from the finding of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals, without opinion, and his petition for review in the Court of Appeals was dismissed, with one judge dissenting. 363 F. 2d 488. It held that the term "psychopathic personality," as used by the Congress in § 212 (a)(4), was a term of art intended to exclude homosexuals from entry into the United States. It further found that the term was not

*"Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excludable from admission into the United States: (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect . . . ."

Section 241 (a)(1) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. § 1251 (a)(1), provides that: "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . ."

void for vagueness and was, therefore, not repugnant to the Fifth Amendment's Due Process Clause. We granted certiorari, 385 U. S. 927, and now affirm.

I.

Petitioner, a Canadian national, was first admitted to this country on June 22, 1955, at the age of 21. His last entry was in 1959, at which time he was returning from a short trip to Canada. His mother and stepfather and three of his brothers and sisters live in the United States. In 1963 he applied for citizenship and submitted to the Naturalization Examiner an affidavit in which he admitted that he was arrested in New York in October 1959, on a charge of sodomy, which was later reduced to simple assault and thereafter dismissed on default of the complainant. In 1964, petitioner, at the request of the Government, submitted another affidavit which revealed the full history of his sexual deviate behavior. It stated that his first homosexual experience occurred when he was 14 years of age, some seven years before his entry into the United States. Petitioner was evidently a passive participant in this encounter. His next episode was at age 16 and occurred in a public park in Halifax, Nova Scotia. Petitioner was the active participant in this affair. During the next five years immediately preceding his first entry into the United States petitioner had homosexual relations on an average of three or four times a year. He also stated that prior to his entry he had engaged in heterosexual relations on three or four occasions. During the eight and one-half years immediately subsequent to his entry, and up to the time of his first statement, petitioner continued to have homosexual relations on the average of three or four times a year. Since 1959 petitioner has shared an apartment with a man with whom he has had homosexual relations.

The 1964 affidavit was submitted to the Public Health Service for its opinion as to whether petitioner was excludable for any reason at the time of his entry. The Public Health Service issued a certificate in 1964 stating that in the opinion of the subscribing physicians petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate" at the time of his admission. Deportation proceedings were then instituted. "No serious question," the Special Inquiry Officer found, "has been raised either by the respondent [petitioner here], his counsel or the psychiatrists [employed by petitioner] who have submitted reports on the respondent as to his sexual deviation." Indeed, the officer found that both of petitioner's psychiatrists "concede that the respondent has been a homosexual for a number of years but conclude that by reason of such sexual deviation the respondent is not a psychopathic personality." Finding against petitioner on the facts, the issue before the officer was reduced to the purely legal question of whether the term "psychopathic personality" included homosexuals and if it suffered illegality because of vagueness.

II.

The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase "psychopathic personality" to include homosexuals such as petitioner.

Prior to the 1952 Act the Immigration Law excluded "persons of constitutional psychopathic inferiority." 39 Stat. 875, as amended, 8 U. S. C. § 136 (a) (1946 ed.). Beginning in 1950, a subcommittee of the Senate Committee on the Judiciary conducted a comprehensive study of the immigration laws and in its report found "that the purpose of the provisions against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with

psychopathic personality' and that the classes of mentally defective should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, 81st Cong., 2d Sess., p. 345. The resulting legislation was first introduced as S. 3455 and used the new phrase "psychopathic personality." The bill, however, contained an additional clause providing for the exclusion of aliens "who are homosexuals or sex perverts." As the legislation progressed (now S. 2550 in the 82d Congress), however, it omitted the latter clause "who are homosexuals or sex perverts" and used only the phrase "psychopathic personality." The omission is explained by the Judiciary Committee Report on the bill:

> "The provisions of S. 716 [one of the earlier bills not enacted] which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.*" (Emphasis supplied.) S. Rep. No. 1137, 82d Cong., 2d Sess., p. 9.

Likewise, a House bill, H. R. 5678, adopted the position of the Public Health Service that the phrase "psychopathic personality" excluded from entry homosexuals and sex perverts. The report that accompanied the bill shows clearly that the Committee adopted the recommendation of the Public Health Service that "psychopathic personality" should be used in the Act as a phrase that would

exclude from admission homosexuals and sex perverts. H. R. Rep. No. 1365, 82d Cong., 2d Sess. It quoted at length, and specifically adopted, the Public Health Service report which recommended that the term "psychopathic personality" be used to "specify such types of pathologic behavior as homosexuality or sexual perversion." We, therefore, conclude that the Congress used the phrase "psychopathic personality" not in the clinical sense, but to effectuate its purpose to exclude all homosexuals and other sex perverts.

Petitioner stresses that only persons *afflicted* with psychopathic personality are excludable. This, he says, is "a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior." Petitioner's contention must fall to his own admissions. For over six years prior to his entry petitioner admittedly followed a continued course of homosexual conduct. The Public Health Service doctors found and certified that at the time of his entry petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission. . . ." It was stipulated that if these doctors were to appear in the case they would testify to this effect and that "no useful purpose would be served by submitting this additional psychiatric material [furnished by petitioner's doctors] to the United States Public Health Service. . . ." The Government clearly established that petitioner was a homosexual at entry. Having substantial support in the record, we do not now disturb that finding, especially since petitioner admitted being a homosexual at the time of his entry. The existence of this condition over a continuous and uninterrupted period prior to and at the time of petitioner's entry clearly supports the ultimate finding upon which the order of deportation was based.

III.

Petitioner says, even so, the section as construed is constitutionally defective because it does not adequately warn him that his sexual affliction at the time of entry could lead to his deportation. It is true that this Court has held the "void for vagueness" doctrine applicable to civil as well as criminal actions. See *Small Co.* v. *Am. Sugar Ref. Co.*, 267 U. S. 233, 239 (1925). However, this is where "the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule at all . . . ." In short, the exaction must strip a participant of his rights to come within the principle of the cases. But the "exaction" of § 212 (a)(4) never applied to petitioner's conduct after entry. The section imposes neither regulation nor sanction on conduct. In this situation, therefore, no necessity exists for guidance so that one may avoid the applicability of the law. The petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed *at the time of* his entry. Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. The pattern was cut, and under it he was not admissible.

The constitutional requirement of fair warning has no applicability to standards such as are laid down in § 212 (a)(4) for admission of aliens to the United States. It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. See *The Chinese Exclusion Case*, 130 U. S. 581 (1889). Here Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and was ordered deported. The basis of the deportation order was his

affliction for a long period of time *prior to entry*, i. e., six and one-half years before his entry. It may be, as some claim, that "psychopathic personality" is a medically ambiguous term, including several separate and distinct afflictions. Noyes, Modern Clinical Psychiatry (3d ed.) (1941) 410. But the test here is what the Congress intended, not what differing psychiatrists may think. It was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics. It can hardly be disputed that the legislative history of § 212 (a)(4) clearly shows that Congress so intended.

But petitioner says that he had no warning and that no interpretation of the section had come down at the time of his 1955 entry. Therefore, he argues, he was unaware of the fact that homosexual conduct engaged in after entry could lead to his deportation. We do not believe that petitioner's post-entry conduct is the basis for his deportation order. At the time of his first entry he had continuously been afflicted with homosexuality for over six years. To us the statute is clear. It fixes "the time of entry" as the crucial date and the record shows that the findings of the Public Health Service doctors and the Special Inquiry Officer all were based on that date. We find no indication that the post-entry evidence was of any consequence in the ultimate decision of the doctors, the hearing officer or the court. Indeed, the proof was uncontradicted as to petitioner's characteristic at the time of entry and this brought him within the excludable class. A standard applicable solely to time of entry could hardly be vague as to post-entry conduct.

The petitioner raises other points, including the claim that an "arriving alien" under the Act is entitled to medical examination. Since he is not an "arriving alien" subject to exclusion, but a deportable alien within an ex-

cludable class—who through error was permitted entry—it is doubtful if the requirement would apply. But we need not go into the question since petitioner was twice offered examination and refused to submit himself. He can hardly be heard to complain now. The remaining contentions are likewise without merit.

Affirmed.

MR. JUSTICE BRENNAN dissents for the reasons stated by Judge Moore of the Court of Appeals, 363 F. 2d 488, 496–499.

SUPREME COURT OF THE UNITED STATES

No. 440.—October Term, 1966.

Clive Michael Boutilier, Petitioner, *v.* Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 22, 1967.]

Mr. Justice Douglas, with whom Mr. Justice Fortas concurs, dissenting.

The term "psychopathic personality" is a treacherous one like "communist" or in an earlier day "Bolshevik." A label of this kind when freely used may mean only an unpopular person. It is much too vague by constitutional standards for the imposition of penalties or punishment.

Cleckley defines "psychopathic personality" as one who has the following characteristics:

> (1) Superficial charm and good "intelligence." (2) Absence of delusions and other signs of irrational "thinking." (3) Absence of "nervousness" or psychoneurotic manifestations. (4) Unreliability. (5) Untruthfulness and insincerity. (6) Lack of remorse or shame. (7) Inadequately motivated antisocial behavior. (8) Poor judgment and failure to learn by experience. (9) Pathologic egocentricity and incapacity for love. (10) General poverty in major affective reactions. (11) Specific loss of insight. (12) Unresponsiveness in general interpersonal relations. (13) Fantastic and uninviting behavior with drink and sometimes without. (14) Suicide rarely carried out. (15) Sex life impersonal, trivial and poorly integrated. (16) Failure to follow any life plan. Cleckley, The Mask of Sanity 238–255 (1941).

The word "psychopath" according to some means "a sick mind." Guttmacher and Weihofen 86 (1952):

> "In the light of present knowledge, most of the individuals called psychopathic personalities should probably be considered as suffering from neurotic character disorders. They are, for the most part, unhappy persons, harassed by tension and anxiety, who are struggling against unconscious conflicts which were created during the very early years of childhood. The nature and even the existence of these conflicts which drive them restlessly on are unknown to them. When the anxiety rises to a certain pitch, they seek relief through some anti-social act. The frequency with which this pattern recurs in the individual is dependent in part upon the intensity of the unconscious conflict, upon the tolerance for anxiety, and upon chance environmental situations which may heighten or decrease it. One of the chief diagnostic criteria of this type of neurotically determined delinquency is the repetitiveness of the pattern. The usual explanation, as for example, that the recidivistic check-writer has just 'got in the habit of writing bad checks' is meaningless." *Id.*, at 88–89.

Many experts think that it is "a meaningless designation . . . not yet is there any common agreement . . . as to classification or . . . etiology." Noyes, Modern Clinical Psychiatry 410 (3d ed. 1941). "The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran & Mallinson, Psychopathic Personality, 90 J. Mental Sci. 266, 278. See also Guttmacher: Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time, in Current Problems in Psychiatric Diagnosis 139, 154

(Hoch & Zubin ed. 1953); Tappan, Sexual Offenses and Treatment of Sexual Offenders in the United States, in Sexual Offenses 500, 507 (Radzinowicz ed. 1957). It is much too treacherously vague a term to allow the high penalty of deportation to turn on it.

When it comes to sex, the problem is complex. Those "who fail to reach sexual maturity (heterosexuality), and who remain at a narcissistic or homosexual stage" are the products "of heredity, of glandular dysfunction, [or] of environmental circumstances." Henderson, Mental Abnormality and Crime (1949), p. 114.

The homosexual is one, who by some freak, is the product of an arrested development:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being. It is present in the adolescent stage, where there is a considerable amount of undifferentiated sexuality." Abrahamsen, Crime and the Human Mind (1944), p. 117.

Many homosexuals become involved in violations of laws; many do not. Kinsey reported:

> "It is not possible to insist that any departure from the sexual mores, or any participation in socially taboo activities, always, or even usually, involves a neurosis or psychosis, for the case histories abundantly demonstrate that most individuals who engage in taboo activities make satisfactory social adjustments. There are, in actuality, few adult males who are particularly disturbed over their sexual histories. Psychiatrists, clinical psychologists, and others who deal with cases of maladjustment, sometimes come to feel that most people find diffi-

culty in adjusting their sexual lives; but a clinic is no place to secure incidence figures. The incidence of tuberculosis in a tuberculosis sanitarium is no measure of the incidence of tuberculosis in the population as a whole; and the incidence of disturbance over sexual activities, among the persons who come to a clinic, is no measure of the frequency of similar disturbances outside of clinics. The impression that such 'sexual irregularities' as 'excessive' masturbation, pre-marital intercourse, responsibility for a pre-marital pregnancy, extra-marital intercourse, mouth-genital contacts, homosexual activity, or animal intercourse, always produce psychoses and abnormal personalities is based upon the fact that the persons who do go to professional sources for advice are upset by these things.

"It is unwarranted to believe that particular types of sexual behavior are always expressions of psychoses or neuroses. In actuality, they are more often expressions of what is biologically basic in mammalian and anthropoid behavior, and of a deliberate disregard for social convention. Many of the socially and intellectually most significant persons in our histories, successful scientists, educators, physicians, clergymen, business men, and persons of high position in governmental affairs, have socially taboo items in their sexual histories, and among them they have accepted nearly the whole range of so-called sexual abnormalities. Among the socially most successful and personally best adjusted persons who have contributed to the present study, there are some whose rates of outlet are as high as those in any case labelled nymphomania or satyriasis in the literature, or recognized as such in the clinic." Kinsey, Sexual Behavior in the Human Male (1948), pp. 201–202.

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. I agree with Judge Moore, dissenting below, that the legislative history should not be read as imputing to Congress a purpose to classify under the heading "psychopathic personality" every person who had ever had a homosexual experience:

> "Professor Kinsey estimated that 'at least 37 per cent' of the American male population has at least one homosexual experience, defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age.[1] Kinsey, Pom-

[1] "Homosexual activity in the human male is much more frequent than is ordinarily realized. In the youngest unmarried group, more than a quarter (27.3%) of the males have some homosexual activity to the point of orgasm. The incidence among these single males rises in successive age groups until it reaches a maximum of 38.7 per cent between 36 and 40 years of age.

"High frequencies do not occur as often in the homosexual as they do in some other kinds of sexual activity. Populations are more homogeneous in regard to this outlet. This may reflect the difficulties involved in having frequent and regular relations in a socially taboo activity. Nevertheless, there are a few of the younger adolescent males who have homosexual frequencies of 7 or more per week, and between 26 and 30 the maximum frequencies run to 15 per week. By 50 years of age the most active individual is averaging only 5.0 per week.

"For single, active populations, the mean frequencies of homosexual contacts rise more or less steadily from near once per week for the younger adolescent boys to nearly twice as often for males between the ages of 31 and 35. They stand above once a week through age 50." Kinsey, Sexual Behavior in the Human Male 259–260 (1948).

> eroy & Martin, Sexual Behavior in the Human Male 623 (1948). Earlier estimates had ranged from one per cent to 100 per cent. *Id.*, at 616–622. The sponsors of Britain's current reform bill on homosexuality have indicated that one male in 25 is a homosexual in Britain.[2] To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores.[3] Indeed, so broad a definition might well comprise more than a few members of legislative bodies." 363 F. 2d 488, 497–498.

The Public Health Service, from whom Congress borrowed the term "psychopathic personality" (H. R. Rep. No. 1365, 82d Cong., 2d Sess., 46–47) admits that the term is "vague and indefinite." *Id.*, at 46.

If we are to hold, as the Court apparently does, that any acts of homosexuality suffice to deport the alien, whether or not they are part of a fabric of antisocial behavior, then we face a serious question of due process. By that construction a person is judged by a standard that is almost incapable of definition. I have already quoted from clinical experts to show what a wide range

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[2] Report, Committee on Homosexual Offenses and Prostitution (1957).

[3] Sigmund Freud wrote in 1935:

"Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too. If you do not believe me, read the books of Havelock Ellis." Ruitenbeek, The Problem of Homosexuality in Modern Society 1 (1963).

the term "psychopathic personality" has. Another expert [4] classifies such a person under three headings:

Acting: (1) inability to withstand tedium, (2) lack of a sense of responsibility, (3) a tendency to 'blow up' under pressure, (4) maladjustment to law and order, and (5) recidivism.

Feeling: they tend to (1) be emotionally deficient, narcissistic, callous, inconsiderate, and unremorseful, generally projecting blame on others, (2) have hair-trigger emotions, exaggerated display of emotion, and be irritable and impulsive, (3) be amoral, (socially and sexually), and (4) worry, but do nothing about it.

Thinking: they display (1) defective judgment, living for the present rather than for the future, and (2) inability to profit from experience, i. e., they are able to realize the consequences intelligently, but not to evaluate them.

We held in *Jordan* v. *DeGeorge*, 341 U. S. 223, that the crime of a conspiracy to defraud the United States of taxes involved "moral turpitude" and made the person subject to deportation. That, however, was a term that has "deep roots in the law." *Id.*, at 227. But the grab-bag—"psychopathic personality"—has no "deep roots" whatsoever.[5] Caprice of judgment is almost certain under this broad definition. Anyone can be caught who is unpopular, who is off-beat, who is nonconformist.

Deportation is the equivalent to banishment or exile. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10. Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Even apart from deportation

[4] Caldwell, Constitutional Psychopathic State (Psychopathic Personality) Studies of Soldiers in the United States Army, 3 J. Crim. Psychopath 171–172 (1941).

[5] See Lindman & McIntyre, The Mentally Disabled and the Law 299 (1961).

cases, we look with suspicion at those delegations of power so broad as to allow the administrative staff the power to formulate the fundamental policy. See *Watkins* v. *United States*, 354 U. S. 178, 203–205; *Kent* v. *Dulles*, 357 U. S. 116. In the *Watkins* case we were protecting important First Amendment rights. In the *Kent* case we were protecting the right to travel, an important ingredient of a person's "liberty" within the meaning of the Fifth Amendment. We deal here also with an aspect of "liberty" and the requirements of due process. They demand that the standard be sufficiently clear as to forewarn those who may otherwise be entrapped and to provide full opportunity to conform. "Psychopathic personality" is so broad and vague as to be hardly more than an epithet. The Court seeks to avoid this question by saying that the standard being applied relates only to what petitioner had done prior to his entry, not to his postentry conduct. *But at least half of the questioning of this petitioner related to his postentry conduct.*

Moreover, the issue of deportability under § 212 (a) of the Act turns on whether petitioner is "afflicted with psychopathic personality." On this I think he is entitled to a hearing to satisfy both the statute and the requirement of due process.

One psychiatrist reported:

> "On psychiatric examination of Mr. Boutelier, there was no indication of delusional trend or hallucinatory phenomena. He is not psychotic. From his own account, he has a psychosexual problem but is beginning treatment for this disorder. Diagnostically, I would consider him as having a Character Neurosis, believe that the prognosis in therapy is reasonably good and do not think he represents any risk of decompensation into a dependent psychotic reaction nor any potential for frank criminal activity."

Another submitted a long report ending as follows:

> "The patient's present difficulties obviously weigh very heavily upon him. He feels as if he has made his life in this country and is deeply disturbed at the prospect of being cut off from the life he has created for himself. He talks frankly about himself. What emerged out of the interview was not a picture of a psychopath but that of a dependent, immature young man with a conscious, an awareness of the feelings of others and a sense of personal honesty. His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. My own feeling is that his own need to fit in and be accepted is so great that it far surpasses his need for sex in any form.
>
> "I do not believe that Mr. Boutilier is a psychopath."

In light of these statements, I cannot say that it has been determined that petitioner was "afflicted" in the statutory sense either at the time of entry or at present. "Afflicted" means possessed or dominated by. Occasional acts would not seem sufficient. "Afflicted" means a way of life, an accustomed pattern of conduct. Whatever disagreement there is as to the meaning of "psychopathic personality," it has generally been understood to refer to a consistent, lifelong pattern of behavior conflicting with social norms without accompanying guilt. Cleckley, *supra*, at 29.[8] Nothing of that character was

[8] There is good indication that Congress intended the term "afflicted with psychopathic personality" to refer only to those individuals demonstrating "developmental defects or pathological

shown to exist at the time of entry. The fact that he presently has a problem, as one psychiatrist said, does not mean that he is or was necessarily "afflicted" with homosexuality. His conduct is, of course, evidence material to the issue. But the informed judgment of experts

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trends in the personality structure manifest[ed] by lifelong patterns of action or behavior . . . ." U. S. Public Health Service, Report on Medical Aspects of H. R. 2379, U. S. Code Cong. & Admin. News 1700 (1952). The provision for exclusion of persons afflicted with psychological personality replaced the section of the 1917 Act, 39 Stat. 875, providing for the exclusion of "persons of constitutional psychopathic inferiority." The purpose of that clause was "to keep out 'tainted blood,' that is, 'persons who have medical traits which would harm the people of the United States if those traits were added to those in this country who unfortunately are so afflicted.'" The Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, 81st Cong., 2d Sess., 343 (1950). The Senate subcommittee which had been charged with making an investigation of the immigration laws concluded that "the exclusion of persons with 'constitutional psychopathic inferiority' was aimed at keeping out of the country aliens with a propensity to mental aberration, those with an inherent likelihood of becoming mental cases, as indicated by their case history." *Ibid.* It concluded that "the purpose of the provision against 'persons with constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts." S. Rep. No. 1515, at 345. Senate Report 1515 accompanied Senate bill 3455, which included among excludable aliens "aliens afflicted with psychopathic personality," and "aliens who are homosexuals or sex perverted." The bill was redrafted and became Senate bill 716, with its counterpart in the House being House bill 2379; the material provisions remained the same as in Senate bill 3455. In response to the House's request for its opinion on the new provisions, the Public Health Service noted that:

"The conditions classified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals

is needed to make the required finding. We cruelly mutilate the Act when we hold otherwise. For we make the word of the bureaucrat supreme, when it was the expertise of the doctors and psychiatrists on which Congress wanted the administrative action to be dependent.

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with such a disorder may manifest a disturbance of intrinsic personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation." U. S. Code Cong. & Admin. News 1700 (1950).

The letter setting forth the views of the Public Health Service went on to say, with respect to the exclusion of "homosexuals or sex perverts":

"Ordinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality.' This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, transvestism, pedophilia, etc." *Id.*, at 1701.

The bill which was finally enacted, House bill 5678, provided for exclusion of "aliens afflicted with psychopathic personality," but did not provide for exclusion of aliens who are homosexuals or sex perverts, as had its predecessors. The House Report, H. R. 1365, which accompanied the bill incorporated the full report of the Public Health Service (H. R. Rep. No. 1365, at 46–48) and indicated that the "recommendations contained in the . . . report have been followed." *Id.*, at 48.

This legislative history indicates that the term "afflicted with psychopathic personality" was used in a medical sense and was meant to refer to lifelong patterns of action that are pathologic and symptomatic of grave underlying neurosis or psychosis. Homosexuality and sex perversion, as a subclass, are limited to the same afflictions.